Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RISSLER & MCMURRY CO,
a Wyoming corporation,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari
To The Wyoming Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN R. HURSH
Attorney for Petitioner
Central Wyoming Law
Associates, P.C.
105 South 6th East Street
P.O. Box 1788
Riverton, Wyoming 82501
(307) 856-4157

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion and ruling of the Wyoming Supreme Court in failing to allow a forum for petitioner's constitutionally based takings claims at the Rule 12 threshold was contrary to this Court's opinion in *Lucas v. South Carolina Coastal Council,* (505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed 2d 798) (1992).

2. Whether the opinion and ruling of the Wyoming Supreme Court in requiring absolute exhaustion of administrative remedies where a facially invalid rule was alleged to exist was contrary to this Court's opinion in *Lucas* and *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1552, 118 L.Ed.2d 153 (1992).

3. Did the Wyoming Supreme Court err in applying a Wyoming Statute, W.S. § 35-11-1001(b), to limit the operation of the takings clause of the Fifth Amendment of the U.S. Constitution by denial of a forum.

PARTIES

The petitioner is Rissler & McMurry Co., a Wyoming corporation.

The respondent is the State of Wyoming.

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OPINIONS BELOW

The **opinion** of the Wyoming Supreme Court appears in the Pacific Reporter at 917 P.2d 1157. It is attached as Appendix A for the convenience of the Court.

The **Decision Letter** of the State District Court is unpublished. It is attached as Appendix B.

The **Petition for Rehearing** to the Wyoming Supreme Court is attached as Appendix C.

The **Order Denying Petition for Rehearing** is attached as Appendix D.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Wyoming Supreme Court pursuant to 28 U.S.C. 1257 and Supreme Court Rule 10(e).

DATE OF OPINION SOUGHT TO BE REVIEWED

The opinion sought to be reviewed was issued June 5, 1996.

DATE OF DENIAL OF PETITIONER'S PETITION FOR REHEARING

The Petition for Rehearing was denied by the Wyoming Supreme Court on July 16, 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The decision of the Wyoming Supreme Court is in conflict with this Court's opinions relative to the takings provisions of the Fifth Amendment to the U.S. Constitution. Also questioned is the application of a Wyoming Statute, W.S. § 35-11-1001(b), to defeat the operation of the takings clause. The facially invalid rule as alleged in the complaint is in contradiction to W.S. 35-11-112(a)(v).

STATEMENT OF THE CASE

A. CHRONOLOGY

This case presented claims for temporary and permanent takings under the Fifth Amendment of the United States Constitution and similar provisions of the Wyoming Constitution. The verified complaint was originally filed in the State Court of Wyoming, First Judicial District, seeking takings damages resulting from petitioner's inability to obtain a hearing and mining permit to mine limestone. The property right involved to mine the limestone derived from a 10 year limestone mining lease issued to the petitioner by the State of Wyoming in 1989, on a section of land owned by the state. The fair market value of the limestone was in excess of 40 million dollars.

The State trial court dismissed the complaint upon a Rule 12(b)(6) motion (Appendix E). The trial court interpreted *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 120 L.Ed 2d 798 (1992) to require complete exhaustion of state administrative remedies before raising a takings claim and relied on W.S. § 35-11-1001(b) to provide the sole takings remedy in this case. The State trial court elected to deny a forum to determine the existence of administrative futility and opted not to address the existence of a facially invalid rule enacted by the Environmental Quality Counsel (EQC), specifically to defeat petitioner's mine permit although alleged as such in the complaint.

The Wyoming Supreme Court affirmed the Rule 12 (b)(6) dismissal of petitioner's complaint (Appendix A). The Wyoming Supreme Court rejected a forum to determine the factual basis for application of the futility doctrine and dodged the issue of a facially invalid rule as not being decided below.

The court went outside the record to justify its findings,[1] and subsequently denied petitioner's request for a rehearing (Appendix C and D). The Wyoming Supreme Court opted for complete exhaustion of administrative remedies and in a Rule 12 stature made its own fact finding that "evidence" of administrative futility had not been demonstrated. The court further opined that the Wyoming legislature, by enactment of W.S. § 35-11-1001(b), created the sole takings remedy only if a mine permit is denied on certain limited grounds.

B. FACTUAL BACKGROUND

The factual background giving rise to petitioner's takings claims as filed in the State Court are summarized from the verified complaint (Appendix E) since this was a Rule 12 disposition below.[2]

The verified complaint set up two separate and distinct "takings" claims against the State of Wyoming. The first claim is for a "temporary taking" of the petitioner's benefits of ownership and use of the State mining lease for its planned initial mining of 40 acres of limestone. This claim is based upon statutory violations, due process, and regulatory takings theories and alleges that the State of Wyoming, by and through the Environmental Quality Council (EQC), has acted in such a way to delay, frustrate and render futile the petitioner's efforts to get a hearing or to obtain an initial 40 acre small mine permit under its State mining lease for the period commencing in April of 1992 and continuing until January 31, 1994, upon the filing of this lawsuit and the subsequent withdrawal of its permit application. Numerous

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[1]The Petition for Rehearing explicitly points out the materials outside the Rule 12(b)(c) record relied upon in the Wyoming Supreme Court's opinion to rationalize its results (Appendix C).

[2]This notwithstanding the ventures outside the record by the Wyoming Supreme Court as previously noted.

distinct and continuous "takings acts" are alleged to have occurred in this intervening period of time. Violations of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §§ 33 and 35 of the Wyoming Constitution are alleged. The temporary claim addresses the violations of law and delays in the administrative process in trying to get a hearing and a formal decision on its pending small mine permit.

The second claim is for a "permanent takings" of the remainder of petitioner's investor backed expectations for this mining lease involving an additional 110 acres of the lease. This taking is alleged to have become permanent and vested in January of 1994 when the EQC enacted a facially invalid rule and again unlawfully dismissed the statutory required hearing date. Accordingly, the complaint alleges administrative futility to continue the permitting process to get any hearings or mine permits at all to utilize its mining lease for its planned future investor backed expectation of obtaining any permit for the remaining 110 acres of feasible limestone mining under the lease. Violations of the same federal and state constitutional provisions are alleged.

Separate and distinct damages are requested for the two different takings claims theories. The temporary takings of the petitioner's property rights in the pending 40 acre small mine permit totalling 2,923,840 tons of limestone is valued at a fair market value of $20,466.880. The permanent takings involves the remaining 110 acres of the petitioner's investor backed expectation in the mining lease. This claim totals another 2,834,289 tons with a fair market value of $19,840.023.00.

The history of this case begins on July 2, 1989 when the elected Board of Land Commissioners of the State of Wyoming, for a valuable consideration, granted the petitioner Rissler & McMurry, a Limestone Mining Lease on a section of State owned school land known as Bessemer Mountain

located in Natrona County, Wyoming. This lease was for a period of 10 years and was issued for the specific purpose of mining limestone only. In this lease, the State of Wyoming granted petitioner a property right for the specific purpose of mining limestone. The leasehold covered 640 acres and was, at the time of the filing of the complaint, in full force and effect.

At the time of the issuance of the mining lease by the petitioner in 1989, there were no statutory or regulatory restrictions or regulations concerning this section of land in effect, excepting the requirement to obtain a mine permit prior to commencing the mining of the limestone.

In order to obtain the benefit and use of its limestone mining lease, the petitioner submitted its Application for Small Mine Permit under W.S. § 35-11-401 to the Department of Environmental Quality (DEQ) on December 17, 1991. This initial application was to mine limestone on an initial 40 acres of the 640 acre lease. Likewise, as of the date of filing of the small mine permit application, there were no regulations or restrictions of the use of this section of respondent's land.

The Department of Environmental Quality is the administrative processing agency for the State of Wyoming for mine permit applications. The ultimate decision making authority on the issuance of a mine permit is vested in the Environmental Quality Council (EQC). The statutory scheme of the State of Wyoming with respect to mining permits is written in such a way that unless certain statutory disqualifying conditions exist, a mining permit is to be issued as a matter of course by the EQC. The DEQ is charged with the administrative duty to determine compliance with the statutory requirements and conditions for the issuance of the permit. When the mine permit application is deemed in compliance with the requirements of the law, the DEQ certifies the permit application as technically complete to the

EQC. W.S. § 35-11-406(k) then specifically mandates that the EQC shall hold the public permit hearing within 20 days after publication of notice. If compliance with the statutorily defined conditions has been certified by the DEQ to exist, the mine permit must be issued by the EQC unless the mining activity falls within the narrow exceptions of W.S. § 35-11-401 or unless the land in question is determined to be rare and uncommon under the legislative definition in effect at the time.

On March 13, 1992, petitioner's small mine permit application was deemed technically complete by the DEQ. The EQC hearing, by law under W.S. § 35-11-406(k)[3], was mandated to be held on May 5, 1992. That hearing has never been held. This was the first of many alleged subsequent unlawfully continued or dismissed hearings for the determination of petitioner's small mine permit by the EQC. No statutory authority exists for the EQC to continue or dismiss a permit hearing under W.S. § 35-11-406(k) without a stipulation of the parties involved. It is mandated by the statute to hold a hearing within 20 days of certification and if not disqualified by a statutory precondition, to grant the permit.

The political pressure for the hearing delays derived from the fact that in the Spring of 1992, an environmentally based group was formed to protest this mining permit. It became collectively known as the "Friends of Bessemer Mountain." Upon the behest of this group, on March 27, 1992, the EQC made a political decision to engage in a rule making process so as to classify this land as rare and uncommon and create a denial criteria for the use of this

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[3]The relevant portion of W.S. 35-11-406(k) reads as follows: "(k) ... An informal conference or public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties ..."

section of State land for petitioner's mine permit application. This was a potential disqualifying criteria for mining which did not exist for this parcel when the State lease was granted in 1989 nor when the small mine permit application was filed in December of 1991, nor when the DEQ certified the application to be technically complete on March 13, 1992. No formal notice of this proposed rule making decision was given to petitioner. They read about it in the newspaper. On April 23 and 24, the Bessemer Mountain area was so designated as rare and uncommon by the EQC without any definitional rules or criteria. The mine permit application then was remanded back to the DEQ to apply the after-the-fact disqualifying criteria of rare and uncommon to the petitioner's pre-existing permit application. This was likewise done without any statutory authority, and over petitioner's continuing objections to the administrative delays.

The petitioner appealed the EQC's decision to the Wyoming Supreme Court and it was reversed. *Matter of Bessemer Mountain*, 856 P.2d 450 (Wyo. 1993). The Wyoming Supreme Court found that the EQC's administrative conduct was arbitrary, capricious and in violation of law. After the court's mandate, the DEQ on July 8, 1993 again certified the petitioner's small mine permit application as complete within the statutory definitions of a rare and uncommon criteria. Again, under W.S. § 35-11-406(k), the permit hearing was again mandated to be on August 25, 1993. This hearing was likewise never held. Instead the EQC again elected over petitioner's continuing objections to dismiss the hearing to allow for new rule making, i.e., to create a new disqualifying criteria outside the statutory definitions, in order to apply them retroactively to this pre-existing mine permit application. The EQC unlawfully dismissed the August 25, 1993 mandatory hearing and proceeded to adopt new rules and definitional criteria pertaining to the rare and uncommon designation in December of 1993.

On December 14, 1993, the EQC drafted new rules to define a rare and uncommon criteria and decided to retroactively apply its new rules to petitioner's pending small mine permit on hold since December 17, 1991, and advised the parties of the council's intent that the area encompassed in petitioner's application was going to be again designated rare and uncommon at a hearing to be held on February 16, 1994. This was to be done despite petitioner's continuing objections.

On January 4, 1994, the EQC published new rules for rare and uncommon designations under W.S. § 35-11-112(a)(o). These new rules included "paleontological" sites designed to specifically capture the area of petitioner's limestone mining lease. That criteria is not one defined in the enabling legislation to form the basis of a rare and uncommon area. W.S. § 35-11-112(a)(o). It was a new creation outside the permitted legislative mandate and facially invalid.

On January 31, 1994, the EQC, without authority, granted a further continuance of the petitioner's permit application hearing from February 16, 1994 until April of 1994, all over petitioner's continuing objections.

After enactment of the alleged facially invalid rule and when the January 31, 1994 hearings were again continued by the EQC, petitioner, at that point, determined that all future attempts to even get a hearing or obtain a mining permit were futile. Accordingly, the petitioner determined its takings claims had vested.[4]

On February 10, 1994, notice of petitioner's claims for permanent and temporary takings were filed with the

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[4]After withdrawal of petitioners application for a small mine permit, the EQC did proceed on April of 1994 to classify Bessemer Mountain rare and uncommon according to its new criteria. Petitioners mining lease is still in effect until 1999 and has never been cancelled.

Wyoming State Auditor as required by W.S. § 9-1-409 and the Department of Administration and Information. This lawsuit was filed on February 23, 1994. Petitioner subsequently withdrew its small mine permit application as futile to continue the administrative process.

The vesting date for all takings claims was alleged in the complaint as January 31, 1994.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

THE WYOMING SUPREME COURT ELECTED NOT TO FOLLOW *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* AND REFUSED TO PROVIDE A FORUM FOR PETITIONER'S FIFTH AMENDMENT TAKINGS CLAIMS.

This is a Rule 12(b)(6) State Court dismissal of petitioner's constitutionally based takings claims. In so doing, the Wyoming Supreme Court denied a forum for the full factual development and adjudication of the merits of petitioner's Fifth Amendment claims as alleged in the complaint.

This Court has made it abundantly clear since the seminal case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L.Ed 322, 43 S.Ct. 158 (1922) that takings claims are uniquely fact specific and that a forum is to be provided for full factual development of these constitutionally based claims and adjudications are to be made on the merits below for appellate review. This concept has become strengthened over the years and is one of the "citadels" of takings law jurisprudence. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, (1978).

In *Lucas v. South Carolina Coastal Council, supra*, this Court strongly restated the procedural prohibition against threshold dismissals under Rule 12 of constitutionally based

takings claims in State Court at the pleading stage that allege, as here in petitioner's complaint, an "injury-in-fact." The law of the land is clear and unequivocal from *Lucas*:

> ...Lucas properly alleged injury-in-fact in his complaint, see App to Pet for Cert 154 (complaint); id., at 156 (asking property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 312-313, 96 L. Ed 2d 250 107 S Ct. 2378 91987) Justice Blackmun finds it "baffling, post, at --, n 5, 120 L. Ed. 2d, at 830, that we grant standing here, whereas "just a few days ago, in Lujan v Defenders of Wildlife, 504 US --, 119 L. Ed. 2d 351, 112 S Ct -- (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, post, at --, 120 L. Ed 2d, at 826, is "eager to decide" it, post, at --, 120 L. Ed. 2d, at 831, and is unwilling to "be denied," post at --, 120 L.Ed. 2d, at 829. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. **The distinction, however, rests in law rather than chronology. Lujan, since it involved the establishment of injury-in-fact at the *summary judgment stage,* required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.** Lucas. FN. 3 at p. 810 (Emphasis supplied.)

Petitioner's verified complaint alleges injury-in-fact at the pleading stage as a result of administrative futility and enactment of a facially invalid administrative rule. The denial of a forum to determine the factual basis and reasonableness of petitioner's contention of administrative futility and the facial invalidity of the administrative rule is contrary to *Lucas* and should be reviewed by this Court on certiorari.

II.

THE WYOMING SUPREME COURT ELECTED TO IGNORE *LUCAS* AND *YEE V. CITY OF ESCONDIDO,* WHICH VESTS A TAKINGS CLAIM UPON ENACTMENT OF A FACIALLY INVALID RULE WITHOUT FURTHER ADMINISTRATIVE PROCEEDINGS.

The allegations of the verified complaint set forth the enactment of a facially invalid rule by the Environmental Quality Council of the State of Wyoming on January 4, 1994. It is set forth in the pleading stage. (Appendix E) There is little dispute in the record developed to date that the administrative creation of a "paleontological" category by the EQC to capture this limestone mining application was outside the legislative mandate and definitions.

The Wyoming legislature enacted W.S. § 35-11-112(a)(v) to empower the Environmental Quality Council (EQC) to designate those areas of the State which are "very rare or uncommon" and fall within the following specific criteria: "historical, archeological, wildlife, surface geological, botanical or scenic." This statute is reprinted at Appendix F for the Court's convenience. Paleontology is not within the statutory criteria. The rule was enacted to catch a limestone mining permit as limestone is fossil based and falls within the science of paleontology.

In the first appeal by the petitioner here, the Wyoming Supreme Court set aside the conduct of the EQC to classify the lands involved in this permit application as rare and

uncommon to have been arbitrarily applied without definitions. *Matter of Bessemer Mountain*, 856 P.2d 450 (Wyo. 1993).

Upon remand, the EQC reacted to the appellate reversal and created a new administrative rule to add paleontology as a category to form the basis for denial of this mining permit. This rule was clearly designed to capture the petitioner's limestone mining permit so as to create a category upon which this mining permit application would be denied. Except in this case, the Wyoming Supreme Court has uniformly condemned and invalidated this type of administrative "knee jerk." *See Kerr-McGee Corporation v. Wyoming Oil & Gas Conservation Commission,* 903 P.2d 537 (Wyo. 1995). The EQC further demonstrated its administrative hostility to this permit by applying these new rules retroactively to capture the petitioner's long standing mine permits application.

Lucas and *Yee v. City of Escondido,* 503 U.S. 519, 112 S. Ct. 1522, 118 L.Ed 2d 153 (1992), are clear and unequivocal that a facially invalid regulation allegation in the complaint vests the takings claim upon the date of enactment and no more administrative proceedings need be exhausted. The State trial court and the Wyoming Supreme Court refused to discuss or apply *Lucas* and *Yee* and put the petitioner to the full task of administrative exhaustion. The Trial Court's Decision Letter (Appendix B) simply ignored the facially invalid rule aspect of *Lucas* and *Yee* and instead applied a Wyoming statute, W.S. § 35-11-1001(b) to require full administrative exhaustion before a forum would be available to factually develop the allegations in the complaint of a facially invalid rule.

The Wyoming Supreme Court ducked the mandate of *Lucas* and *Yee* by observing in a footnote that the issue was not raised by petitioner in the trial court and therefore not an appellate issue for them to decide. Such is obviously not the

case as this was a Rule 12 disposition and the petitioner, relying on *Lucas* and *Yee,* indeed pled the invalid rule and the vesting of the takings claim without further administrative exhaustion in its complaint. That is all the petitioner could do at the Rule 12 level and that is all this Court has ever required to vest the alleged takings claim. The Wyoming Supreme Court's further requirement that petitioner meet a "burden of proof with significant evidence at the Rule 12 stage" is in error. The required constitutional prerequisites under *Lucas* and *Yee,* were alleged at the pleading stage as is the injury-in-fact.

In fact, the Wyoming Supreme Court further challenged this Court's rulings in *Lucas, Yee* and *First Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987), by suggesting that petitioner would have to file for judicial review of the contested facially invalid rule in separate litigation before its takings claim was ripe. *First Lutheran Church* strongly suggests that such procedural impediments are not required ..." It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid." 482 U.S. @ 320.

The petitioner has been to the Wyoming Supreme Court on direct appeal twice, *Matter of Bessemer Mountain,* 856 P.2d 450 (Wyo. 1993) and the instant case, 917 P.2d 1157 (Wyo. 1996) and on two collateral appeals *Snodgrass v. Rissler & McMurry,* 903 P.2d 1015 (Wyo. 1995) and *Stalkup v. State of Wyoming, Dept. of Environmental Quality,* 838 P.2d 705 (Wyo. 1992).

Petitioner's efforts to get a hearing and a mining permit begin to approach the prohibitions of *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, that, "a property owner is, of course, not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." *Id.* @ 350. Conceivably, before

these "endless trails of litigation" are exhausted, the 10 year term of petitioner's lease will have long expired and this constitutionally based takings claim against the State of Wyoming will be avoided.

The decision of the Wyoming Supreme Court to ignore the mandate of *Yee* and *Lucas,* and deny a forum, merits review by this Court as contrary to the law of the land.

III.

THE WYOMING SUPREME COURT APPLIED A STATE LEGISLATIVE ENACTMENT AS A SUBSTANTIVE AND PROCEDURAL LIMITATION UPON PETITIONER'S ACCESS TO A FORUM TO ADJUDICATE ITS FIFTH AMENDMENT BASED TAKINGS CLAIM.

The State trial court and the Wyoming Supreme Court ruled that W.S. § 35-11-1001(b) provided the only procedure for a Fifth Amendment takings claim to be pursued in the State Courts of Wyoming as relates to mining permits.

W.S. § 35-11-1001(b) provides:

> "Any person having a legal interest in the mineral rights or any person or corporation having a producing mine or having made substantial capital expenditures and commitments to mine mineral rights with respect to which the state has prohibited mining operations because the mining operations or proposed mining operations would irreparably harm, destroy or materially impair an area that has been designated to be a unique and irreplaceable historical, archeological, scenic or natural value, may petition the district court for the district in which the mineral rights are located to determine unconstitutional taking without compensation. Upon a determination that a

> taking has occurred the value of the investment in the property or interests condemned shall be ascertained and damages shall be assessed as in other condemnation proceedings."

Again, regardless of the mandate of this Court in *Lucas* and *Yee,* the Wyoming Supreme Court limited a takings recourse to the final event of administrative denial of a mining permit due to a rare and uncommon classification. The rationale being that this Wyoming Statute procedurally creates and therefore substantively limits the parameters of a federal constitutionally preserved takings claim. In other words, a mining lease holder in Wyoming must exhaust all administrative remedies, regardless of *Lucas* and *Yee,* and further be denied a mining permit upon the narrow grounds of the existence of a rare and uncommon area before a constitutionally protected takings claim may have a forum in the State Courts of Wyoming.

This type of State legislative action designed or interpreted to render Federal constitutionally based claims with or without severely restricted remedies, including denial of a forum, is inimical to the Fifth Amendment and is invalid. The takings clause of the Fifth Amendment is self executing. *Jacobs v. United States,* 290 U.S. 13 (1933). *First Lutheran Church v. Los Angles County, supra.* As argued in petitioner's rehearing brief (Appendix C), this decision completely obviates the concept of Fifth Amendment takings claim in the State of Wyoming by denial of a forum and a remedy at the Rule 12 pleading stage in the State Courts.

This issue operating alone and in tandem with the other issues raised in this petition merits review by this Court upon certiorari.

CONCLUSION

This is a Fifth Amendment takings case dismissed by the State Courts of Wyoming at the Rule 12 pleading stage

which claims allege administrative futility and a facially invalid administrative rule drafted strictly in accord with *Lucas* and *Yee*. The Wyoming State Court's denial of a forum based upon State statutory restrictions on the vesting of Fifth Amendment takings claims and the denial of a forum to develop and adjudicate the specific facts of these constitutionally based claims severally restricts and limits takings claims in the State of Wyoming directly contrary to the law of the land in *Lucas* and *Yee*. The injury-in-fact is alleged at the pleading stage. Under *Lucas* and *Yee,* this court requires nothing more at this point to vest a forum. That State Court forum is essential so that the required "ad hoc, factual inquiries," can be made upon a clean and factually determined record. *Penn Central, supra*, 438 U.S. @ 124, *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. @ 316.

This case should be reviewed and remanded on certiorari to direct a forum upon an uncompromised record. Otherwise, claims under the takings clause of the Fifth Amendment will not be allowed in the State of Wyoming except in very limited circumstances as determined solely by State law.

DATED this 30 day of September, 1996.

John R. Hursh
CENTRAL WYOMING LAW ASSOCIATES, P.C.
P.O. Box 1783
Riverton, WY 82501
(307) 856-4157

APPENDIX A

Opinion of Wyoming Supreme Court

No. 95-239

RISSLER & MCMURRY CO. a Wyoming corporation

Appellant - Plaintiff,

v.

STATE OF WYOMING

Appellee - Defendant.

June 5, 1996

MACY, Justice.

Appellant Rissler & McMurry Co. appeals from the order which dismissed its complaint against Appellee State of Wyoming. Rissler was seeking a judgment for its alleged takings claims and its damages.

We affirm.

ISSUE

Rissler presents a single issue for our review:

> The trial court erred in dismissing the plaintiff's separate temporary and permanent takings claims on the premise that both claims were premature under the provisions of W.S. § 35-11-1001(b).

FACTS

Rissler entered into a ten-year limestone mining lease with the State on July 2, 1989. This lease covers a section of state-owned land located on Bessemer Mountain in Natrona County. Pursuant to the lease, Rissler agreed to comply with

all state statutory requirements and valid regulations, which included obtaining a valid mining permit.

On December 17, 1991, Rissler submitted its application for a small mine permit to the Department of Environmental Quality as WYO. STAT. § 35-11-405(a) (1994) requires, seeking permission to mine a 40-acre parcel located within the mining lease area. On March 13, 1992, the Department of Environmental Quality certified that the permit application was complete and suitable for publication. Rissler published its notice of the pending permit in accordance with the statute. The Department of Environmental Quality received numerous written objections during the comment period and, therefore, referred the permit application to the Environmental Quality Council for a formal hearing and determination under the Wyoming Administrative Procedure Act. WYO. STAT. §§ 35-11-406(m)(x) (Supp. 1995), -112(a)(iv) (1994).

In April of 1992, a separate proceeding was held, involving a designation petition which was filed for the purpose of having Bessemer Mountain designated as being "rare or uncommon." Following the hearing, the Environmental Quality Council determined that Bessemer Mountain met the criteria for being "rare or uncommon" and so designated it. The Environmental Quality Council then remanded Rissler's permit application to the Department of Environmental Quality, directing it to evaluate the application in light of the "rare or uncommon" designation. Rissler filed a petition for review in the district court, challenging the Environmental Quality Council's determination that Bessemer Mountain met the criteria for being "rare or uncommon." The district court certified the matter to the Court because of the constitutional and procedural questions which were involved and because it was in the best interest of justice and economy. *Rissler & McMurry v. Environmental Quality Council (In re Bessemer Mt.)*, 856 P.2d 450, 451 (Wyo. 1993).

Rissler began mining operations in late 1992 on ten acres of the leased land as was allowed under WYO. STAT. § 35-11-401(e)(vi) (1994). On June 23, 1993, the Department of Environmental Quality again certified that the permit application was complete and suitable for publication. The permit application, however, was not complete because paleontology survey results were not included. The Environmental Quality Council dismissed the case without prejudice and remanded the application, directing the Department of Environmental Quality to review the findings of a Rissler-conducted paleontology survey on the area before certifying the application as being complete. The Environmental Quality Council also vacated a scheduled August 19-20, 1993, hearing on the matter.

On July 10, 1993, the Department of Environmental Quality again certified that the permit application was complete and suitable for publication. Numerous objections were again lodged against the permit application, and the Department of Environmental Quality again forwarded the application to the Environmental Quality Council for a formal hearing. Pursuant to the contested case provisions of the Wyoming Administrative Procedure Act, the Environmental Quality Council ruled on several motions at that hearing and then set a contested case hearing on the permit application for February 22, 1994.

Contemporaneously with the July 1993 Department of Environmental Quality and Environmental Quality Council actions on the permit application, we reversed the Environmental Quality Council's "rare or uncommon" classification of Bessemer Mountain and remanded the case, finding that the Environmental Quality Council had not adopted appropriate standards in accordance with the Wyoming Administrative Procedure Act procedures on rule making. *See Rissler & McMurry,* 856 P.2d 450. As a result of this ruling, the

Environmental Quality Council promulgated new rules in December of 1993 to define the "rare or uncommon" criteria.

On January 31, 1994, the Environmental Quality Council continued the February 22, 1994, hearing on Rissler's application for a small mine permit until April of 1994. On February 10, 1994, Rissler filed its verified notice of claim with the State, and the State denied it on February 16, 1994. A hearing on a new petition to designate Bessemer Mountain as being "rare or uncommon" was held on February 16, 1994. On February 17, 1994, the Environmental Quality Council decided to delay making any decision until after the Legislature had adjourned it session. On February 23, 1994, approximately a month before the hearing was to be held on its application, Rissler withdrew its application for a small mine permit. On the same day, Rissler filed its verified complaint in the district court, alleging, among other things, that the State temporarily and permanently deprived Rissler of the benefits of owning its lease without providing just compensation and deprived it of its procedural and substantive due process rights.

The State moved to dismiss under W.R.C.P. 12(b)(6). After hearing arguments on the matter, the district court granted the State's motion on the grounds that Rissler had not exhausted its administrative remedies. It is from that order that Rissler makes this appeal.

STANDARD OF REVIEW

We have often stated the standard we apply when we are reviewing a W.R.C.P. 12(b)(6) dismissal:

> When reviewing a W.R.C.P. 12(b)(6) dismissal, the Court accepts all facts stated in the complaint as being true and views them in the light most favorable to the plaintiff. We will sustain a W.R.C.P. 12(b)(6) dismissal only when its is certain from the face of the com-

> plaint that the plaintiff cannot assert any facts which would entitle him to relief.

Herrig v. Herrig, 844 P.2d 487, 490 (Wyo. 1992) (citation omitted), *quoted in Davis v. State,* 910 P.2d 555, 560 (Wyo. 1996). Although dismissal is a drastic remedy which should be granted sparingly, a motion to dismiss "'is the proper method for testing the legal sufficiency of the allegations and will be sustained when the complaint shows on its face that the plaintiff is not entitled to relief.'" *Feltner v. Casey Family Program,* 902 P.2d 206, 208 (Wyo. 1995) (quoting *Mummery v. Polk,* 770 P.2d 241, 243 (Wyo. 1989)).

DISCUSSION

Rissler contends that the State's conduct resulted in a temporary and permanent taking of its limestone mining lease and that it did not exhaust its administrative remedies because it would have been futile to continue trying to get a hearing on its permit application. The district court's ruling focused upon the exhaustion-of-remedies issue. We, therefore, will limit the scope of our decision to that issue.

The decision to decline jurisdiction because a party has failed to exhaust its administrative remedies is vested within the sound discretion of the district court. *Glover v. State,* 860 P.2d 1169, 1171 (Wyo. 1993).

> "The exhaustion doctrine applies where an agency alone has been granted or found to possess exclusive jurisdiction over the case. The purpose of the doctrine then is to avoid premature interruption of the administrative process where the agency has been created to apply a statute in the first instance."

860 P.2d at 1171-72 (quoting *People v. Fremont Energy Corporation,* 651 P.2d 802, 811 (Wyo. 1982)). The reasons for applying the exhaustion doctrine have been well noted:

> "A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals."

860 P.2d at 1172 (quoting *McKart v. United States,* 395 U.S. 185, 193-94 (1969)).

When an agency denies an application or withholds or delays action on a permit application, statutory means exist under which the affected party may petition a court for review of the agency's actions. WYO. STAT. § 16-3-114 (1990) provides in pertinent part:

> (a) ...[A]ny person aggrieved or adversely affected in fact by ... agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review in the district court for the county in which the administrative action or inaction was taken, or in which any real property affected by the administrative action or inaction is located, or if no real property is involved, in the district

court for the county in which the party aggrieved or adversely affected by the administrative action or inaction resides or has its principal place of business. The procedure to be followed in the proceeding before the district court shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming Supreme Court.

...

(c) To the extent necessary to make a decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. In making the following determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall:

(i) Compel agency action unlawfully withheld or unreasonably delayed; ...

In addition, the Legislature has established mechanism for determining whether an agency's denial of all or a part of a mining permit, on the basis of a "rare or uncommon" designation, rises to the level of being a compensable taking. WYO. STAT. § 35-11-1001(b) (1994) provides a remedy for those parties who believe that their property has been taken as a result of a permit application being denied. It states:

(b) Any person having a legal interest in the mineral rights or any person or corporation having a producing mine or having made substantial capital expenditures and commitments to mine mineral rights with respect to which the state has prohibited mining operations

> because the mining operations or proposed mining operations would irreparably harm, destroy or materially impair an area that has been designated to be of a unique and irreplaceable historical, archeological, scenic or natural value, may petition the district court for the district in which the mineral rights are located to determine whether the prohibition so restricts the use of the property as to constitute an unconstitutional taking without compensation. Upon a determination that a taking has occurred the value of the investment in the property or interests condemned shall be ascertained and damages shall be assessed as in other condemnation proceedings.

Section 35-11-1001(b).

These statutes require a final agency decision to be rendered before an appeal may be initiated or an action for an unconstitutional taking may be pursued. Rissler did not proceed pursuant to the above provisions. Rissler's application for a small mine permit was never denied. Instead, Rissler withdrew its application approximately a month before the hearing was to occur and filed its complaint on the same day. By going directly to court, Rissler circumvented the statutes designed to provide relief. *See Cheyenne Airport Board v. Rogers,* 707 P.2d 7171 (Wyo. 1985), *dismissed,* 476 U.S. 1110 (1986).

The trial court cited *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), in concluding that Rissler's takings claims were premature. In *Williamson County Regional Planning Commission,* the United States Supreme Court held:

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

473 U.S. at 186. The Supreme Court went on to explain:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of taking. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 124-125, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1980)). If the government has provided an adequate process for obtaining compensation, and if resort to that process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. [*Ruckelshaus v.] Monsanto [Company],* 467 U.S. [986,] 1013, 1018, n. 21, 104 S.Ct. [2862,] 2878, 2881, n. 21 [, 81 L.Ed.2d 815 (1984)].

473 U.S. at 194-95 (footnote and some citations omitted).

The Legislature has charged the Environmental Quality Council with the responsibility for approving or denying applications for mining permits. WYO. STAT. § 35-11-112(c)(ii) (1994). Until its determination has been rendered, the courts do not have jurisdiction under § 35-11-1001(b) to make a decision on a compensatory taking action or entertain an appeal from the denial of an application for a permit under § 16-3-114 and W.R.A.P. 12.

Rissler claims that pursuing the permit process would have been futile because the "rare or uncommon" designation[1] as well as the continuances of the contested case hearing made it pointless for Rissler to continue. The United States Supreme Court has held: "Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 351, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986).

We agree with the Washington Supreme Court's holding:

> Once exhaustion is raised as a defense, the landowner seeking to establish "futility" as an exception to the exhaustion requirement must persuade the court that futility excuses exhaustion. This is a substantial burden because of the strong public policies favoring the exhaustion doctrine.

---

[1]Rissler argues for the first time on appeal that creating a "paleontological" category within the definitional rule of "rare or uncommon" made the rule and regulation facially invalid. We will not consider issues which are raised for the first time on appeal. *Hiltz v. Robert W. Horn, P.C.,* 910 P.2d 566, 572 (Wyo. 1996).

Presbytery of Seattle v. King County, 787 P.2d 907, 916-17 (Wash.) (en banc), *cert. denied,* 498 U.S. 911 (1990) (footnote omitted). The Washington Supreme Court concluded that the landowner's claim was not ripe for adjudication because the landowner had not sought development permits and that, therefore, it was not possible to know what deprivation of beneficial use might result from a wetlands ordinance. 787 P.2d at 917.

The only evidence which suggests that it would have been pointless for Rissler to continue with the permit process is Rissler's opinion that it would have been futile. The fact that an area receives a "rare or uncommon" designation does not necessarily mean that a permit application will be automatically denied. WYO. STAT. § 35-11-406(m)(iv) (Supp. 1995) requires that a permit be denied only if the "proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated ... a rare or uncommon area." Since Rissler withdrew its permit application, the Environmental Quality Council was never given the opportunity to decide whether to approve the application.

Rissler cites various cases in an attempt to support its position that it was excused from exhausting its administrative remedies under the futility exception. Rissler relies on *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). That case, however, does not help Rissler as it stands for the proposition that, when a landowner has been denied all use of his property, an ordinance cannot escape review on takings grounds simply because the ordinance is later repealed or amended. 482 U.S. at 319-21.

Rissler also relies on *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), in asserting this position. *Lucas* is likewise not helpful to Rissler. In *Lucas,* the United States Supreme Court refused

to apply the exhaustion-of-remedies rule only because the South Carolina Supreme Court had disposed of the case on its merits rather than on ripeness grounds. The agency in question admitted that a permit to build would not and could not have been issued. 505 U.S. at 1012 n.3. Otherwise, the exhaustion-of-remedies rule would have been applied. 505 U.S. at 1011-12.

In this case, by contrast, the agency never stated that a permit would not or could not be issued. Furthermore, Rissler was not unconditionally and permanently deprived of all its value in the mining lease. The withdrawal of the permit application prior to the agency's final decision made it impossible for such a final, permanent deprivation to occur.

We disagree with Rissler's argument that the Environmental Quality Council does not have statutory authority to continue a hearing. We have recognized that continuances may be requested in the administrative hearing context. *See State ex rel. Wyoming Workers' Compensation Division v. Rivera,* 796 P.2d 447, 452 (Wyo. 1990); *see also Grams v. Environmental Quality Council,* 730 P.2d 784, 788 (Wyo. 1986) (reviewing a refusal to grant a continuance in a surface-coal-mine-permit case under an abuse-of-discretion standard rather than under a lack-of-statutory-authority standard).

While we understand Rissler's frustration with the bureaucratic hoops which it was required to jump through, we cannot sanction its total abandonment of the administrative process. The Wyoming Administrative Procedure Act provides appropriate remedies for those parties who have been aggrieved by an agency's actions, and a party must exhaust those remedies before it pursues alternative forms of relief.

CONCLUSION

Rissler failed to sustain its burden of establishing that it was excused by reason of futility from exhausting its

administrative remedies, and, thus, the district court correctly dismissed Rissler's temporary and permanent takings claims as being premature.

Affirmed.

APPENDIX B

DECISION LETTER OF
WYOMING STATE DISTRICT COURT

April 14, 1995

THE STATE OF WYOMING
FIRST JUDICIAL DISTRICT

EDWARD L. GRANT
JUDGE

LARAMIE COUNTY COURTHOUSE
CHEYENNE, WYOMING
82001

April 14, 1995

John Hursh
Donald Rissler
Central Wyoming Law Associates
P.O. Box 1783
Riverton, WY 82501-1783

Larry Donovan
Sr. Ass't. Attorney General
123 Capitol Building
Cheyenne, WY 82002

Re: *Rissler & McMurry v. State*
Docket 136-071

Dear Counsel:

The Court will grant defendant's 12(b)(6) motion for the reasons given here.

On July 2, 1989, Rissler & McMurry Company (hereafter "Rissler") entered into a ten-year "Limestone Mining Lease" with the State of Wyoming, The lease

covered a section of state-owned land on Bessemer Mountain in Natrona County. Under the terms of the lease, Rissler agreed to comply with all state statutory requirements and valid regulations.

Rissler began mining operations on ten acres of the leased land as allowed under W.S. § 35-11-401(e)(vi)(Supp. 1994) in late 1992. On December 17, 1991, Rissler submitted a small mine claim permit application with the Department of Environmental Quality (DEQ) pursuant to W.S. § 35-11-405(a)(Supp. 1994). The DEQ certified the permit complete and suitable for publication on March 13, 1992. Rissler published notice of the pending permit application as required by statue. The DEQ received numerous written objections to the permit application during the thirty-two day comment period.

The written objections prompted the DEQ director to refer the permit application to the Environmental Quality Council (EQC) for a formal hearing. In a separate proceeding, the EQC designated Bessemer Mountain as "rare or uncommon" after a two-day hearing in April, 1992. The EQC remanded the permit application to the DEQ with directions to evaluate the permit application in light of the "rare or uncommon" designation were not included in the application at the time of the EQC hearing.

On June 23, 1993, the DEQ certified the remanded permit application as complete and suitable for publication. The EQC subsequently dismissed the DEQ certification without prejudice. It again remanded the permit application with directions for the DEQ to review the findings of a Rissler-conducted survey on paleontology of the area before certifying the application as complete. The EQC also vacated a scheduled August 19-20, 1993, hearing on the matter in light of its remand order.

On July 10, 1993, the DEQ once again certified the permit application as complete and suitable for publication, The published notice elicited numerous objections to the permit application. The DEQ director again forwarded the application to the EQC for a formal hearing. The EQC determined it would treat the permit application hearing as a contested case pursuant to the Wyoming Administrative Procedure Act. It scheduled a hearing on the matter on August 25, 1993.

Contemporaneous with the July 1993, DEQ and EQC actions on the permit application, the Wyoming Supreme Court reversed the EQC's designation of Bessemer Mountain as "rare of uncommon" on July 15, 1993. The Court found that the EQC failed to adopt standards for the "rare or uncommon" classification in accordance with the Wyoming Administrative Procedure Act rulemaking requirements. The EQC adopted properly promulgated rules for the "rare or uncommon" designation in December, 1993.

The EQC ruled on several motions at the August 25 hearing. It then set a contested case hearing on the permit application for February 22, 1994. The State Auditor formally denied the claims six days later. On February 23, 1994, the DEQ received a notice of immediate withdrawal of the small mine permit application. The next day, Rissler filed this lawsuit against the State of Wyoming in the First District Court.

The defendant claims that the complaint should be dismissed for the reason, among others, that plaintiff has failed to exhaust the administrative remedies to it, having withdrawn its small mine permit application after the second designation of the proposed site as rare and uncommon, pursuant to § 35-11-1001(b). Plaintiff asserts that further pursuit of the permit would be futile and that it did all that it can reasonably be expected to do. This may or may not be so.

But plaintiff acting as it did, faces a more fundamental problem. The complaint, in view of applicable law, establishes that no Fifth Amendment "taking" has occurred because the state statue provides a procedure for the determination of whether a permit denied on the basis of rare and uncommon designation constitutes a taking and provides a basis and procedure from just compensation. Wyoming Statute § 35-11-101(b), Wyoming Eminent Domain Act, § 1-26-501 et seq, and W.R.C.P. 71.1. Wyoming Statute § 35-11-101(b)(1994) reads as follows:

> (b) Any person having a legal interest in the mineral rights or any person or corporation having a producing mine or having made substantial capital expenditures and commitments to mine mineral rights with respect to which the state has prohibited mining operations because the mining operations or proposed mining operations would irreparably harm, destroy or materially impair an area that has been designated to be of a unique and irreplaceable historical, archeological, scenic or natural value, may petition the district court for the district in which the mineral rights are located to determine whether the prohibition so restricts the use of the property as to constitute an unconstitutional taking without compensation. Upon a determination that a taking has occurred the value of the investments in the property or interests condemned shall be ascertained and damagers shall be assessed as in other condemnation proceedings.

The United States Supreme Court has held that assuming that a regulatory restriction on the use of land was a taking as proscribed by the Fifth Amendment, the owner's claim was premature because he had not obtained a final administrative decision concerning the effect of the zoning regulation on the use of his property or utilized statutory provisions to obtain compensation. The prematurity was held

to be dispositive of a due process denial claim as well as of the takings claim. The developers claim was not "ripe". *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187, 87 L. Ed 2d 126, 105 S. Ct. 3108, (1985) quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297, (1981).

The Court held that because the developer had not applied for variances from the disputed zoning regulation, there could be no determination of the extent of the economic impact of the regulation. Rissler responds to that proposition here by asserting the doctrine of futility. But the Court in *Hamilton* did not limit its holding to the requirement of exhaustion of administrative remedies. It said at page 143 of 87 L. Ed. 2d:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S., at 297, n 40, 69 L. Ed. 2d 1, 101 S. Ct, 2352. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. [Citations omitted.] If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government: for a taking, *Monsanto*, 467 U.S., at 1013, 1018, n 21, 81 L. Ed. 2d 815, 104 S. Ct. 2862.
>
> * * *
>
> At p. 147:

> In sum, respondent's claim is premature, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the just Compensation Clause of the Fifth Amendment.

In *Lucas v. So. Carolina Coastal Council*, 120 L. Ed 798 (1992), relied on here by both parties, the defendant Council argued this principal, seeking dismissal of Lucas's takings claim against it. The Court refused to apply the rule, but only because the South Carolina Supreme Court had rejected that disposition. Otherwise, this rule would have been applied.

> We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see brief for Respondent 9, n 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits.

Lucas v. So. Carolina Coastal Council, 120 L. Ed. 2d 798 (1992), at 810.

The state, by the statues and rules cited above has provided a "reasonable, certain and adequate provision for obtaining compensation," the presence of which makes this action premature and perhaps unnecessary by the standard applied in *Hamilton* and acknowledged to be appropriate in *Lucas*. Mr. Donovan will please submit a form of order. Thank you.

Very truly yours,
s/Edward L. Grant
District Judge

ELG/laa

APPENDIX C

PETITION FOR REHEARING WITH BRIEF
WYOMING SUPREME COURT

NO. 95-239

N THE SUPREME COURT

STATE OF WYOMING

RISSLER & McMURRY Co., a Wyoming corporation,	)	
Appellant (Plaintiff),	)	
v.	)	No. 95-239
THE STATE OF WYOMING,	)	
Appellee (Defendant).	)	

PETITION FOR REHEARING

COMES NOW the Appellants, Rissler & McMurry Co., by counsel, and pursuant to the provisions of Rule 9.07, W.R.C.P. files this Petition for Rehearing with accompanying brief requesting reconsideration of the opinion rendered and filed herein on June 5, 1996, upon the following points of error:

ISSUE I

The Court deviated from the standards of review of a W.R.C.P. Rule 12(b)(6)

dismissal in this case as relates to the sufficiency of the allegations of administrative futility set forth in the Complaint.

ISSUE II

The Court cited matters outside the Record on Appeal which appear as factual basis for the opinion instead of the allegations of the Complaint.

ISSUE III

The Court erred in denying a forum for Appellant's constitutionally based takings claims.

ISSUE IV

The Court erred in failure to consider the **facially invalid regulation issue** which under *Lucas* and *Yee v. City of Escondido,* -- U.S.--, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) is determinative of the administrative exhaustion issue.

ISSUE V

The Court's reliance on W.S. § 35-11-1001(b) **limiting the** vesting of Appellant's Federal **Constitutional takings** claim was invalid and in error.

ISSUE VI

The Court's reliance upon *Williamson, supra,* is misplaced as that case involved federal court subject matter jurisdiction access prior to state court exhaustion. With reference to takings claims originally filed in state court, *First English* and *Lucas* control.

RESPECTFULLY submitted this 19 day of June, 1996.

s/JOHN R. HURSH
Attorney for Plaintiff

IN THE SUPREME COURT

STATE OF WYOMING

RISSLER & McMURRY Co., a Wyoming corporation,	)	
Appellant (Plaintiff),	)	
v.	)	No. 95-239
THE STATE OF WYOMING,	)	
Appellee (Defendant).	)	

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

ISSUES PRESENTED FOR REHEARING

The Appellant respectfully presents the following issues that are requested to be reheard in this matter:

ISSUE I

The Court deviated from the standards of review of a W.R.C.P. Rule 12(b)(6) dismissal in this case as relates to the sufficiency of the allegations of administrative futility set forth in the Complaint.

ISSUE II

The Court cited matters outside the Record on Appeal which appear as factual basis for the opinion instead of the allegations of the Complaint.

ISSUE III

The Court erred in denying a forum for Appellant's constitutionally based takings claims.

ISSUE IV

The Court erred in failure to consider the **facially invalid regulation issue** which under *Lucas* and *Yee v. City of Escondido,* -- U.S.--, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) is determinative of the administrative exhaustion issue.

ISSUE V

The Court's reliance on W.S. § 35-11-1001(b) **limiting the** vesting of Appellant's Federal **Constitutional takings** claim was invalid and in error.

ISSUE VI

The Court's reliance upon *Williamson, supra,* is misplaced as that case involved federal court subject matter jurisdiction access prior to state court exhaustion. With reference to takings claims originally filed in state court, *First English* and *Lucas* control.

ARGUMENT

I.

The Court deviated from the standards of review of a W.R.C.P. Rule 12(b)(6) dismissal in this case as relates to the sufficiency of the allegations of administrative futility set forth in the Complaint.

At the outset of the opinion, the appropriate standard of review was recited by the Court for this Rule 12(b)(6) dismissal:

> "When reviewing a W.R.C.P. 12(b)(6) dismissal, this Court accepts all facts stated in the complaint as being true and views them in the light most favorable to the plaintiff. We will sustain a W.R.C.P. 12(b)(6) dismissal only when it is certain from the face of the complaint that the plaintiff cannot assert any facts which would entitle him to relief." (Slip Op. p.3)

"Accepting all facts stated in the Complaint," the following facts should have appeared in the opinion as follows:

> "[In July of 1989, the State of Wyoming granted Rissler & McMurry Co. a limestone mining lease on a school section of State owned land. This lease was granted only for limestone mining and the term was for a period of ten (10) years. Under the lease, the Appellant was required to actively pursue mining to provide royalty income. In order to do so, a small mine permit was required before commencing operations over ten (10) acres. When the lease was issued there were no restrictive classifications on this land. In December of 1991, the Appellant applied for a small mine permit as required under its lease with the State. The Department of Environmental Quality processed the mining permit application and deemed it technically complete on March 13, 1992. Under the law utilized by the DEQ, W.S. § 35-11-406(k), a hearing on that permit by the Environmental Quality Council was to commence within twenty (20) days of publication. That date to commence the hearing was **May 5, 1992**. No hearing was ever held prior to the filing of the Complaint in February of 1994.

In the interim, the EQC held a hearing in March of 1992, without notice to the Appellant, and classified the school section of land as "rare and uncommon." This action required the Appellant to come to this Court for relief. This action by the EQC was set aside by this Court as arbitrary and capricious. In July of 1993, the DEQ, based upon this Court's mandate, again certified the permit to be technically complete. The required hearing was then ordered for August 25, 1993. This hearing was continued by the EQC over Appellant's objections to allow for administrative rule making. On December 14, 1993, the EQC advised Appellant that another hearing on "redoing" the rare and uncommon classification was set for February 16, 1994 and **thereafter** its permit application would be considered. On January 4, 1994 the EQC enacted new rules and created a new category designated as "paleontological" which was outside the legislative definition mandate and which was designed to create an "after the fact" administrative rule to form a denial criteria for this limestone mine permit. On January 31, 1994, the EQC, to accommodate the protestants, and over Appellant's continuing objections to any more delays in having a hearing on its permit application and again reset the hearing for April of 1994.

The EQC did, in fact, classify this land as rare and uncommon after this lawsuit was filed.

In this administrative morass, to the date of filing of the Complaint, the Appellant has had to undertake one direct appeal and now collateral appeals: re road condemnation, etc.

to the Supreme Court; had to endure at least five continuances of its request to simply have a hearing spanning 630 days from a 20 day statutory mandate and face the prospect of over one-half of the life of its lease expired without a hearing and certain denial of the permit under the facially invalid regulation enacted solely to defeat this permit.]"

Those are the "facts" taken as true and established directly from the Complaint. That should have comprised the factual narrative in the recitals as relates to the futility doctrine in the opinion. Nothing else can appear in that narrative in a Rule 12 review but the allegations of the Complaint. The plaintiff cannot "come forth" with more or **sufficient evidence** at this point in the proceedings. What appeared as facts in the opinion did not resemble the Complaint.

However, here it is obvious the Court elected to not accept the facts as alleged in the Complaint as being true, and further, specifically rejected those parts of the Complaint alleging the factual basis of administrative futility as "Rissler's opinion." In so doing, the Court went beyond its own Rule 12 framework of review and made a judgment upon the weight and sufficiency of the evidence as if this was a Rule 56 review. The Court's comment is indicative of that approach here:

"The **only evidence** which suggests that it would have been pointless for Rissler to continue with the permit process is Rissler's opinion that it would have been futile." (Slip Op. p. 7)

Also in the opinion's conclusion, Appellant is chided for **failure to sustain its burden to establish futility.** That is an evidentiary standard which is not appropriate in a Rule 12 review as against a trial burden. The Court obviously went beyond the Complaint here and weighed the evidence of futility even though at the Rule 12 review level, no other

"evidence" can be considered or offered by any party except the allegations of the Complaint. The Court's reliance on *Presbytery of Seattle v. King County,* 787 P.2d 907 (Wash. 1990) creating a high evidentiary level burden was **not** a Rule 12(b)(6) dismissal opinion but a summary judgment review after factual development.[2]

As pointed out in Appellant's brief as originally filed herein, the issue of administrative futility and the factual basis was pled in the Complaint and whether or not the "evidence" of same is sufficient to meet the burdens suggested by *Presbytery* **must be heard and adjudicated below**. Then the **sufficiency** of the evidence determinations can properly be made below for Appellate review. These findings at the pleading stage are premature since the weight of the evidence has not yet had its forum; has not been decided and was not before the Court.

The opinion of this Court in denying a forum at the Rule 12(b)(6) threshold, disregarding the factual allegations of administrative futility as set forth in the Complaint which are accepted here, and instead weighing the sufficiency and burden of the evidence, violates Appellant's rights under the Standards of Review when operating under a Rule 12(b)(6) constraint and is error which this Court should reconsider.

II.

The Court cited matters outside the Record on Appeal which appear as factual basis for the opinion instead of the allegations of the Complaint.

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[2]The Court's reliance on *Presbytery* may be suspect since *Lucas*, as it has now been limited. See, e.q. *Powers v. Skagit County,* 835 P.2d 230 (1992) where *Presbytery's* limitations after *Lucas* is discussed by the Washington State Appellate Court.

Directly related to the first issue of concern, is the Appellant's observation that matters outside the Record on Appeal were considered in these deliberations.

To frame this concern and analysis, it is axiomatic that the only "facts" that can be considered for a Rule 12(b)(6) review are those that appear in the Complaint. Yet, in the factual recitations written to support this opinion appear the following "facts" that do not appear anywhere in the Complaint or its exhibits:

At page 1 - "**In April of 1992, a separate proceeding was held, involving a designation petition which was filed for the purpose of having Bessemer Mountain designated as being rare or uncommon.**" (Slip Op. p. 1)

At page 2 - "**The permit application, however, was not complete because paleontology survey results were not included. The Environmental Quality Council dismissed the case without prejudice and remanded the application, directing the Department of Environmental Quality to review the findings of a Rissler conducted paleontology survey on the area before certifying the application as being complete. The Environmental Quality Council also vacated a scheduled August 19-20, 1993, hearing on the matter.** (Slip. Op. 2)

At page 2 - "On February 23, 1994, **approximately a month before the hearing was to be held on its application,** Rissler withdrew its application for a small mine permit." (Slip Op. p.2) (Emphasis added to show matters outside the record.)[3]

An examination of the allegations of the Complaint finds none of these factual recitations. Since the Complaint, under Rule 12(b)(6) review practice, is the only source of the

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[3]In fact, had discovery been allowed to be done below, many of these "recitations of fact" would have been contested below by Appellant.

"facts" to be recited in an appellate opinion, this aspect of the record upon which this Court based it's opinions is outside the record.

One doesn't have to look far for the source of those "outside the record" facts. Without opening the door to any other of the State's summary judgment materials prohibited from consideration by the Chief Justice's Order, examination of the **excluded affidavit** of Roger Shaffer and it's attachments (R. 86-90) are self-evident as the **source** of these **"facts"** that now appear in the opinion. **The error is patent.** *Gifford v. Casper Neon Sign Co., Inc.*, 618 P.2d 547 (Wyo. 1980).

The Record on Appeal in this case, over the Appellant's strenuous objections, contains the State's affidavits and materials filed below in support of its motions for summary judgment. The parties stipulated and the Trial Court ordered that the State officials' affidavits, etc., were not to be considered, as the Appellant had not been given an opportunity to file its responsive affidavits and documents and more importantly the threshold issues only under a Rule 12 standard were to be decided first.

Accordingly, when the Record on Appeal was ready to be docketed, the Appellant's Designation struck the State's Rule 56 materials from this record in order to keep the record pure. These documents to be stricken were identified as consisting pages 41-179. The State, for obvious tactical reasons, insisted the "stricken" documents come up to this Court in the record. The Appellant then moved this Court to remove those documents from the record for fear that "someone may read them if they are there." This Motion to Strike was denied by the Court **with the caveat that said materials would not be considered in this Appeal**. It is rather clear that this order designed to protect the record from outside influences and references has been compromised. As such, Appellant's due process rights to a proper and fair Rule

12 review based upon the integrity of the record have been compromised and is error.

III.

The Court erred in denying a forum for Appellant's constitutionally based takings claims.

Constitutionally based takings claims have been granted a unique procedural protection from threshold dismissals under Rule 12(b)(6) by the United States Supreme Court.

In 1922, Mr. Chief Justice Holmes, in the seminal case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922), which is the foundation of takings law jurisprudence very clearly set forth the procedural requirements of **full fact specific development** of those constitutionally based claims so that the record is complete with findings in order to be reviewed. This concept was strengthened in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, (1978) Accordingly, there are recorded very few, if any, Rule 12 threshold dismissals of these constitutionally based claims found in the hundreds of reported cases. The basic common thread is that **a forum must be provided to adjudicate the merits** upon full "fact specific" inquiry and development.

The procedural **prohibition against threshold dismissal** of constitutionally based taking claims at the pleading stage that allege, as here in Appellant's Complaint, "injury-in-fact," was recently repeated by Justice Scalia in *Lucas v. So. Carolina Coastal Council,* U.S. 120 L.Ed. 798, 112 S.Ct. 798 in an unequivocal manner:

> "... Lucas properly alleged injury-in-fact in his complaint, see App to Pet for Cert 154 (complaint); id., at 156 (asking property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. First English

> Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 312-313, 96 L. Ed. 2d 250 107 S Ct. 2378 91987) Justice Blackmun finds it "baffling, post, at ---, n 5, 120 L. Ed. 2d, at 830, that we grant standing here, whereas "just a few days ago, in Lujan v Defenders of Wildlife, 504 US ---, 119 L. Ed. 2d 351, 112 S Ct --- (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, post, at ---, 120 L. Ed. 2d, at 826, is "eager to decide" it, post, at ---, 120 L. Ed. 2d, at 831, and is unwilling to "be denied," post at ---, 120 L.Ed. 2d, at 829. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. **The distinction, however, rests in law rather than chronology. Lujan, since it involved the establishment of injury-in-fact at the *summary judgment state,* required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.** (Lucas. FN. 3 (2C) at p. 810) (Emphasis supplied.)

This Court's dismissal of Appellant's Complaint at the pleading stage was error and in direct conflict with one of the basic tenants of the takings law, i.e. the full fact specific development of each case, which by definition is unique to its own circumstances, must be allowed to occur. The test to be applied by the trier of fact is the reasonable basis, given all the circumstances of the claim, of the aggrieved property right holder's belief that it was indeed futile to continue the administrative proceedings in this case. *Hermanson v. Board of County Comm'n, etc.,* 595 P.2d 698 (Colo. 1979). **As**

Justice Scalia wrote in *Lucas,* this is not a matter to be disposed of at the "pleading stage." That is the law of the land and it was not followed in this threshold dismissal at the pleading stage. The forum for developing the facts is not the Supreme Court. *Gifford, supra.* Yet in deciding Appellant had not met its "evidentiary burden" at the pleading stage, the Court did just that and this is error.

IV.

THE COURT ERRED IN FAILURE TO CONSIDER THE FACIALLY INVALID REGULATION ISSUE WHICH UNDER *LUCAS* AND *YEE V. CITY OF ESCONDIDO,* --U.S.--, 112 S.CT. 1522, 118 L.ED.2D 153 (1992) IS DETERMINATIVE OF THE ADMINISTRATIVE EXHAUSTION ISSUE.

The Court made a footnote disposition of Appellant's facially invalid rule contention as being raised for the first time on appeal and therefore not to be considered. Appellant respectfully disagrees.

In the standard of review cited in this opinion, the Court sets forth the test upon appeal "when it appears from the face of the Complaint that the plaintiff cannot **assert any facts which would entitle him** to relief." (Slip Op. p. 3). The invalid rule issue is indeed pled and creates a per se taking claim that is fully vested under *Lucas* and *Yee.*

It is the rule of this Court that review of Rule 12 dismissals are de novo. *True Oil Co. v. Sinclair Oil Corp.,* 771 P.2d 781 (Wyo. 1989).

Here, the Complaint, (R. 4) alleged the invalid rule of the "paleontological" category created by the administration outside its legislative authority. For purposes of a Rule 12 review that pleading averment is taken as established. **As Justice Scalia observed in *Lucas,* at the pleading stage, nothing more is required. A facially invalid regulation vests the takings claim upon the date enacted and no more**

administrative proceedings are required. The date of enactment is January of 1994, before this claim was filed.

Both parties briefed and argued this issue to this Court. This Court, even though the trial court elected not to discuss the issue, upon a Rule 12 review, must review the entire Complaint de novo as it is pled to see if any facts fit a cause of action. There is absolutely no question that it does. Even *Presbytery* admits that claim to exist with no further administrative procedures required. This is the facial taking arising from enactment of an invalid rule.[4]

This aspect of the Appellant's takings claims were pled, briefed and is before the Court for de novo review at the pleading stage. It cannot be ducked here. Under *Kerr McGee Corp., supra*, this administrative rule making is prima facially invalid and is so pled in the Complaint. Accordingly, under *Lucas,* no further administrative exhaustion is required. Those claims vested in January of 1994 when the facially created paleontology rule became effective. *Yee v. City of Escondido,* --U.S.--, 112 Supp. Ct. 1522, 118 L.Ed.2d 153, (1992). That is the law of this case and the law of the land. It cannot be ignored in the **pleading stage** by a footnote disposition. It is dispositive. The current status of the facially invalid category of cases such as pled here, was recently well summarized by a Federal District Court in California in 1994:

> "The Supreme Court has held that before a property owner can make a challenge to the *application* of an ordinance, he must exhaust both administrative remedies under the applicable ordinance and any remedy provided in the state courts that could lead to the provision of just compensation. *Williamson*

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[4]This Court has uniformly condemned and invalidated this very type of administrative rule-making overreach in *Kerr-McGee Corporation v. Wyoming Oil & Gas Conservation Comm'n,* No. 94-292, dcd. Sept. 27, 1994. This precedent should not be ignored here.

County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194, 105 S.Ct. 3108, 3120-21, 87 L.Ed.2d 126 (1985). The Supreme Court addressed the ripeness requirement for a *facial* taking in *Yee v. City of Escondido, Cal,* --U.S. --,--, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992). In *Yee,* the Court held:

> While respondent is correct that a claim that the ordinance effects at regulatory taking *as applied* to petitioners property would be unripe ..., petitioners mount a *facial* challenge to the ordinance. The allege in this Court that the ordinance does not 'substantially advance a legitimate state interest' no matter how it is applied. As this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, **petitioners' facial challenge** is ripe. *Yee, ---U.S. at ---,* 112 S.Ct. at 1532 (emphasis in the original and citations omitted)." *Adamson Companies v. City of Malibu,* 854 F.Supp. 1476 (F.D. Cal. 1994).

The Complaint alleges the invalid rule and both parties briefed and argued same before this Court. This is a Rule 12 review and the Complaint's allegations are to be reviewed de novo to determine the **existence of any valid claim which would allow a forum**. To reject at the pleading stage averments, of a facially invalid rule with the *Lucas* threshold pleading requirement of "injury-in-fact" as not raised below on a Rule 12 review violates this Court's well established procedural precedent of de novo review and avoids a dispositive issue here on takings law as defined by Justice Scalia in *Lucas.* Appellant's taking claim was vested when this lawsuit was filed. See also, *Levald, Inc. v. City of Palm Desert,* 998 F.2d 680 (9th Cir. 1993); *Whitney Benefits, Inc. v. United States,* 502 U.S. 952 (1991). To reject this claim at the pleading stage was error.

V.

The Court's reliance on W.S. § 35-11-1001(b) to limit the vesting of Appellant's Federal Constitutional takings claim was invalid and in error.

This Court, in effect, held that the Wyoming legislature's enactment of W.S. § 35-11-1001(b) creates the exclusive takings remedy that Appellant could pursue here and that in the confines of that statute, the administrative exhaustion rule **applies without exception** to those procedures and the futility exception is rejected.

It is without question that a state legislative enactment cannot operate to limit a claim brought under the Federal Constitution and federal law controls. *Hendler v. United States,* 952 F.2d 1364 (Fed. Cir. 1991). Yet, that is precisely what the Court has done here by applying a limited State statutory remedy to a constitutionally based takings claim coupled with the requirement of absolute administrative exhaustion. This is incompatible with the federal law and is error.

W.S. § 35-11-1001(b) provides that a takings claim may be brought upon a singular occurrence, i.e. if a mining permit is denied due to classification of the area as rare and uncommon. Taken to its logical extreme, this Court's opinion then suggests this is the **only** remedy as defined by the parameters of the Wyoming statute. That concept is too narrow and cannot restrict appellant's constitutionally based claims here.

The Appellant respectfully suggests error here. What if the permit is denied for some other reason than the land classification? By this Court's opinion, there is no takings claim. Or, as alleged here, what if an applicant cannot get a statutory mandated hearing within 20 days; administrative delays of 630 days; one direct and two related appeals to this Court; enactment of an invalid rule which was designed to focus on the denial of this permit and a leasehold that is going

to expire before the "endless trail of litigation" is followed out of the administrative morass. As Justice Stevens wrote in *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 350, "A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination."

These rhetorical questions are posed to frame the dilemma the Appellant faced. Quite simply stated, the April 24, 1994 hearing date would, given the past track record of the EQC with multiple continuances to accommodate the protestants since 1992, in all likelihood, not have yet occurred. Where is the remedy? This Court suggests still another district court action in mandamus to compel a hearing. Where does this endless trail of litigation end? *City of Pompano Beach v. Yardham Restraint, Inc.*, 641 So.2d 1377 (Fla. 1994). The remedy to test this administrative hostility is a temporary takings claim under the United States Constitution, under *First English* and *Lucas*. A state court is under severe constraints to deny a forum at the pleading state as occurred here after *Lucas*.

Appellant's Complaint in this regard was crafted from *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250, (1987) which was decided after *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County,* 423 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985) *First English* creates the temporary takings concept designed to cover situations precisely as are alleged in the Complaint to have occurred here. Basic to the temporary takings claim in Justice Rehnquist's opinion in *First English* and reaffirmed in *Lucas* by Justice Scalia, is the concept if administrative futility where is it alleged, as there in this Complaint, that it would be unreasonable to continue the administrative process. Under *Lucas,* futility exists as an absolute if a facially invalid regulation is pled along with injury-in-fact. Accordingly, a temporary takings claim tests the administrative record upon a fully developed factual

record adjudicated below to determine the procedures, variances and reasonableness not only of the administrative process undertaken by the State but also the reasonableness of the Appellant's futility decision. Then, and only then, can this Court make a fully informed appellate review of this record.[5]

This Court's opinion outright rejecting the futility doctrine and a forum to develop and determine the facts of what has occurred in this permit application matter is directly at odds with the mandates of the U.S. Supreme Court in creating the temporary takings concept. W.S. § 30-11-1001(b) as applied here totally obviates the doctrine of temporary takings in Wyoming and such violates the law of the land.

The Court is respectfully asked to revisit this issue and correct this error by providing a forum for this case to be heard and the facts adjudicated.

VI.

The Court's reliance upon *Williamson, supra*, is misplaced as that case involved federal court subject matter jurisdiction access prior to state court exhaustion. With reference to takings claims originally filed in state court, *First English* and *Lucas* control.

This concern ties in with the previous arguments. It is respectfully suggested here that the court erred in failing to make the critical procedural distinctions found in *Williamson* as defined by the subsequent decisions in *First English, Lucas* and their progeny.

The forum distinction is critical and has not subtly been made by the United States Supreme Court. The first peg

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[5]As counsel submitted at oral argument, Appellant's case may or may not be won below, but at this point under the pleading requirements of *Lucas*, this case begs a forum.

of the distinction is that *Williamson* was a complaint **emanating in the federal court** system and was challenged on the basis of a lack of **federal court subject matter jurisdiction as the state court procedures had not been exhausted**. Interestingly enough, the petitioner in *Williamson* brought his federal court claims under 42 U.S.C. 1983, i.e. the Federal Civil Rights Statute. Also noteworthy is a **jury trial** was held in the federal court, then a J.N.O.V. entered on the subject matter jurisdiction issue of the federal court to hear the claims. The essence of the Supreme Court's ruling is **that until "respondent" has filed and pursued his state court inverse condemnation action to obtain compensation in state court he cannot come to a federal court for relief.** The Appellant here has done just that and **filed it's state court action** first. However, this Court has denied that forum. Even *Williamson* requires a forum to adjudicate the facts of the takings claim in the state court as a basic protection of a constitutional right from which Appellate review can follow to apply the concepts of takings jurisprudence.

First English and *Lucas* make it clear that original state court actions do not require administrative finalities of the administrative process. In fact, both *First English* and *Lucas* specifically distinguish *Williamson* on this point to make it clear.

Perhaps the Ninth Circuit made the best effort to show the erosion of *Williamson, supra*, even in a federal court after *First English* and *Lucas*:

> " [8] We must first consider whether Levald's facial challenge is **ripe.** *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d (1985), placed "two hurdles in the way of a takings claim **brought in federal court** against states and their political subdivisions." *Sinaloa Lake Owners, Ass'n v.*

City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir.1989). The first hurdle-that the claimant must seek a final decision regarding the application of the regulation to the property at issue before the government entity charged with its implementation-does not apply to facial challenges, and is therefore not applicable here. *Yee,* -- U.S. at ---, 112 S.Ct. at 1532.

[9,10] "The second, and independent, hurdle established by *Williamson County* requires plaintiffs to 'seek compensation through the procedures the State has provided for doing so' **before turning to the federal courts.**" *Sinaloa,* 882 F.2d at 1402 (quoting *Williamson,* 473 U.S. at 194-195, 105 S.Ct. at 3120-21). ***Williamson,* however, does not require the plaintiff to bring a state court action where it would be futile under existing state law.** *Williamson,* 473 U.S. at 196-97, 105 S.Ct. at 2121022; *Sinaloa,* 882 F.2d at 1402. "[T]he appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occur[red]." *Sinaloa,* 882 F.2d at 1402. Here, the taking at issue in the facial challenge allegedly occurred at the time the ordinance was enacted--in 1986. California did not recognize actions for inverse condemnation based on *regulatory* takings until *after* the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Therefore, even though Levald did not seek remedies in state court, it was not required to do so because it would have been futile to seek state court relief at the time the alleged taking occurred. The claim is

ripe." *Levald Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993) (Emphasis supplied.)

The Appellant respectfully submits that this Court's reliance on *Williamson* to deny a state court forum for it's constitutionally vested taking claims coupled with an absolute requirement of administrative exhaustion and rejection of the futility concept at the pleading stage was error under the *First English* and *Lucas*. A forum must be provided for full fact specific development of those constitutional claims. The failure to so based upon a *Williamson* rationale is error.

CONCLUSION

Perhaps the policy touchstone that defines the administrative hostility that Appellant found itself in simply attempting to get a hearing and/or obtain a small mine permit was given to the Court at oral argument by counsel for the State of Wyoming in response to a question from Justice Thomas. The question inquired of the State's position should twelve years be required to get a hearing or permit upon a ten year mining lease. The response given was that was a cost of doing business and we (State) have to look out for the rights of the protestants. Parenthetically, nothing was said by State showing any administrative concern for the Fifth Amendment rights of the property right holder. That is the essence of the hostile administrative climate this Appellant faced when it brought it's Fifth Amendment takings claim to the courts of this State.

This Appellant simply asks this Court to revisit this opinion. We rely on what Justice Scalia wrote in *Lucas* that, at the pleading stage, a forum must be provided to develop and adjudicate the fact specific nature of these constitutionally based claims. That was denied here upon an evidentiary standard in a Rule 12 review based upon a compromised record.

This case begs it's forum where a full and clear record can be made and judicially determined as required by the United States Supreme Court.

RESPECTFULLY SUBMITTED this 19 day of June, 1996.

s/JOHN R. HURSH
Attorney for Plaintiff

APPENDIX D

ORDER DENYING PETITION
FOR REHEARING

WYOMING STATE DISTRICT COURT

NO. 95-239

RISSLER & McMURRY CO., a Wyoming corporation,	)
	)
Appellant (Plaintiff),	)
	)
THE STATE OF WYOMING,	)
	)
Appellee (Defendant).	)

ORDER DENYING PETITION FOR REHEARING

This matter came before the Court on the appellant's petition for rehearing. The Court has fully considered that petition and finds it should be denied. It is therefore,

ORDERED that the petition for rehearing be, and hereby is, denied.

DATED this 16 day of July, 1996.

FOR THE COURT:
s/William A. Taylor
Chief Justice

APPENDIX E

VERIFIED COMPLAINT
(Without attachments)

IN THE DISTRICT COURT OF
LARAMIE COUNTY, WYOMING

FIRST JUDICIAL DISTRICT

Civil Action No. 136-71

RISSLER & MC MURRY CO., A Wyoming Corporation,	)
Plaintiff,	)
-vs-	)
THE STATE OF WYOMING,	)
Defendant.	)

VERIFIED COMPLAINT

COMES NOW Plaintiff, Rissler & McMurry Co., a Wyoming corporation, by and through counsel, John R. Hursh and Donald J. Rissler of Central Wyoming Law Associates, P.C., and alleges as follows:

FACTS COMMON TO ALL CLAIMS

1. The Plaintiff is a corporation organized and existing under the laws of the State of Wyoming with its principal place of business in Casper, Wyoming.

2. The State of Wyoming, as a body politic, is sued as the Defendant herein under the Fifth and Fourteenth Amendments to the Constitution of the United States, and

Article I, Sections 33 and 35 of the Constitution of the State of Wyoming.

3. Venue of this cause is properly set in this Judicial District as the seat of government of the Defendant State of Wyoming by operation of W.S. § 1-5-108.

4. The separate and distinct takings claims alleged herein arise under the Just Compensation and Due Process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, and Article I, Sections 33 and 35 of the Constitution of the State of Wyoming.

5. Notice of these claims has been presented to the State Auditor as required by W.S. § 9-1-404 and W.S. § 1-39-101 et seq. by registered mail, return receipt requested, on February 9, 1994, (Notice Letter Attached).

6. The State Auditor formally denied the claim on February 16, 1994, by return letter to the Plaintiff. (Denial Letter Attached).

7. Plaintiff alleges that the Temporary Takings claims as alleged herein commenced on May 5, 1992, reoccurred on August 25, 1993, and again on January 31, 1994, are of a continuing nature.

8. On or about July 2, 1989, the Defendant State of Wyoming, by and through its duly elected and constituted Board of Land Commissioners, granted Plaintiff Rissler & McMurry a ***Limestone Mining Lease*** for a section of State owned school land more particularly described as:

> Section 16, T.32N., R.81 W., 6th Principal Meridian, comprising 640 acres in Natrona County, Wyoming.

9. This Lease Agreement to mine limestone created a contractually and legally sufficient vested and valuable property right in the estate granted for the mining of

limestone for a period of ten (10) years. Said Lease remains in full force and effect.

10. On December 17, 1991, the Plaintiff submitted its Application for a Small Mine Permit in order to commence mining the limestone to the Department of Environmental Quality of the State of Wyoming as required by W. S. 35-11-401, et. seq.. This initial Small Mine Permit Application contemplated mining forty (40) acres under the Mining Lease.

11. On March 13, 1992, the Department of Environmental Quality certified Plaintiff's Small Mine Permit Application as technically complete pursuant to W.S. § 35-11-406(h). Accordingly, W.S. § 35-11-406 then required the State to issue the permit upon hearing by the Environmental Quality Council unless certain reasons for denial exist. On March 13, 1992, all statutory conditions for issuance of the Small Mine Permit had been met by Plaintiff.

12. By operation of W.S. § 35-11-406(k), a hearing on Plaintiff's proposed Small Mine Permit Application was required to be held within twenty (20) days after publication by the Environmental Quality Council. The hearing was, by law, to be held on **May 5, 1992**. To this date, no such hearing has ever been held on this Permit Application.

13. On March 27, 1992, the Plaintiff learned, by reading the newspaper, that the Environmental Quality Council was going to engage in rule making so as to declare the area known as "Bessemer Mountain", which area included Plaintiff's Mining Lease, as "rare and uncommon" under W.S. § 35-11-406 instead of conducting its Mine Permit Hearing as required by law. This designation would create a criteria for denial of the permit which did not exist upon the date the Application was filed, i.e. rare and uncommon.

14. Plaintiff was not given formal notice of this proposed ex post facto rule making as required by law and objected to any such procedure and any delays in its mandated Small Mine Permit Hearing.

15. Nevertheless, on April 23 and 24, 1992, the Environmental Quality Council (EQC) of the Defendant State of Wyoming met and declared the area encompassing Plaintiff's State Mining Lease as a rare and uncommon area. This designation was after the fact of Plaintiff's Application on December 17, 1991, and the DEQ's determination under the law that the Application was technically complete on March 13, 1992. This was an ex post facto regulatory action by the E.Q.C.. Subsequently, on May 4, 1992, without any statutory authority, the EQC remanded Plaintiff's Small Mine Permit Application to the DEQ to apply, on an ex post facto basis, the rare and uncommon criteria to the Application, to qualify as a means for denial of this Small Mine Permit and Plaintiff's property rights in the Limestone Mining Lease.

16. In order to protect its property rights in the Mining Lease, Plaintiff was forced to appeal the acts on the part of the EQC to the Wyoming Supreme Court. This appeal resulted in a reversal of the EQC's designation of this area as rare and uncommon, as being done without rules and definitions. The Supreme Court found in its Opinion dated July 15, 1993, that the EQC's conduct was arbitrary, capricious, and in violation of law. 856 P.2d 450 (Wyo. 1992).

17. Plaintiff again requested a hearing on its December 17, 1991, Small Mine Permit Application. On July 8, 1993, the DEQ again certified that the Application still met the statutory criteria and was technically complete. By law, the hearing was to be on **August 25, 1993**. That hearing was not held.

18. On August 25, 1993, the EQC again continued, without any authority and over Plaintiff's continuing objections, the permit hearing until the EQC could attempt to do another rule making on the rare and uncommon criteria and then apply same to Plaintiff's Mine Permit Application on yet another ex post facto basis.

19. On December 14, 1993, the EQC drafted new rules to define a rare and uncommon criteria and decided to retroactively apply its new rules to Plaintiff's pending Small Mine Permit pending since December 17, 1991, and advised the parties of the Council's intent that the area encompassed in Plaintiff's Application was going to be again designated rare and uncommon at a hearing to be held on February 16, 1994, over Plaintiff's objections.

20. On January 4, 1994, the EQC published new rules for rare and uncommon designations under W.S. § 35-11-112(a)(o). These new rules included paleontological sites designed to specifically capture the area of Plaintiff's Mining Lease. That criteria is not one defined in the enabling legislation to form the basis of a rare and uncommon area. W.S. § 35-11-112(a)(o).

21. On January 31, 1994, the EQC, without authority, granted a further continuance of the Plaintiff's Permit Application hearing until April of 1994, all over Plaintiff's continuing objections.

22. On February 10, 1994, the Plaintiff filed its Verified Notice of Claim, which was denied by the Defendant State of Wyoming on February 16, 1994.

23. On February 17, 1994, the EQC delayed the decision on the rare and uncommon designation again until after the legislative sessions.

24. Simultaneously, with the filing of this lawsuit, the Plaintiff has notified the DEQ of its withdrawal of the Small Mine Permit Application TFN 2 6/247.

25. That the Plaintiff has been faced with a regulatory regime and environment clearly hostile to mining the limestone under its State Mining Lease, as evidenced by the acts and omissions of the EQC and its staff, since its Small Mine Permit Application was initially filed on December 17, 1991.

26. Since March of 1992, the Plaintiff has expended enormous sums of money in legal costs, expert witness fees, appeal costs, and other expenses in order to simply obtain a hearing on its Small Mine Permit Application which by law was to be held on April 2, 1992, in order to utilize the State Mining Lease for which the State of Wyoming has been paid.

FIRST CLAIM FOR RELIEF TEMPORARY TAKING OF PROPERTY RIGHT 40-ACRE SMALL MINE PERMIT

27. The allegations of paragraphs 1 through 26 are realleged and incorporated by reference herein.

28. By reason of the foregoing facts and chronology, the Defendant State of Wyoming, has temporarily taken and deprived the Plaintiff of its benefits of ownership of the State Mining Lease and deprived Plaintiff of viable use of the property rights in question without just compensation and in deprivation of its rights to procedural and substantive due process, all in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States; and Article I, Section 33 and 35 of the Constitution of the State of Wyoming.

29. As a direct result of the acts and omissions of the Defendant State of Wyoming, by and through the Environmental Quality Council, Plaintiff has been denied and deprived of the benefits of Plaintiff's valuable property rights in Plaintiff's Limestone Mining Lease and denied its investment backed uses and expectations of the Mining Lease so as to constitute a Temporary "Takings" in violation of law. Plaintiff alleges this Temporary Taking to have first occurred on May 5, 1992, and to have reoccurred on August 25, 1993, and again on January 31, 1994. Accordingly, the Plaintiff alleges and believes this Temporary Taking to be of a continuing nature until the date of filing of this lawsuit and the withdrawal of its Small Mine Permit Application.

30. As a direct result of the foregoing, Plaintiff has been continuously denied and deprived of mining limestone and processing same under its Mining Lease since April 2, 1992, for forty (40) acres of the lease.

31. Plaintiff's reasonable investor backed expectation under its 40 acre Small Mine Permit was to recover 3,036,910 tons of limestone.

32. Plaintiff has already mined 113,070 tons under its ten-acre exemption and paid the State of Wyoming its five percent (5%) royalty in the amount of $56,535.00.

33. The remaining net tonnage in this 40-acre parcel of expected and reasonable limestone which Plaintiff claims herein to have been temporarily taken by the Defendant State of Wyoming through the hostile regulatory conduct of the EQC is 2,923,840 tons.

34. The fair market value of this limestone, processed as defined in the Mining Lease is $7.00 per ton.

35. By reason of the foregoing, Plaintiff has been temporarily deprived of mining the limestone from this parcel, all to Plaintiff's damage of a fair market value of $21,840,023.00.

SECOND CLAIM FOR RELIEF PERMANENT TAKINGS - 110 ACRE MINE PERMIT

36. The allegations of paragraphs 1 through 35 are realleged and incorporated by reference herein.

37. By reason of the foregoing, the Defendant State of Wyoming has permanently deprived and taken Plaintiff's valuable property rights in its Limestone Mining lease with the State of Wyoming without just compensation and in deprivation of Plaintiff's rights to procedural and substantive due process, all in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, and Sections 33 and 35 of the Constitution of the State of Wyoming.

38. By reason of the foregoing, Plaintiff alleges that it would be futile to continue to pursue any further administrative remedies in obtaining its Small Mining Permit in the face of the continuing hostile regulatory environment, all in violation of its constitutional rights with respect to utilizing its valuable property rights in its State Mining Lease and that said permanent taking has now become fully vested and accrued.

39. As such, Plaintiff alleges and believes the taking and deprivation of its property rights is now permanent without just compensation and due process and that Plaintiff's State Mining Lease has been rendered valueless.

40. Plaintiff's reasonable investor backed expectation under this Mining Lease contemplated mining 110 acres of this Lease for recoverable limestone. The Plaintiff has already mined 113,070 tons under Plaintiff's ten-acre exemption and paid the State of Wyoming $56,535.00 in royalties at five percent (5%).

41. The remaining net tonnage in this parcel of expected and recoverable limestone which Plaintiff claims herein to have been permanently taken by the Defendant State of Wyoming through the conduct of the EQC is 2,834,289 tons.

42. The fair market value of this limestone, processed as defined in the Mining Lease is $7.00 per ton.

43. By reason of the foregoing, Plaintiff has been permanently deprived of mining the limestone under its investor backed expectations, all to its damage of a fair market value of $19,840,023.00.

DAMAGES

44. The allegations of paragraphs 1 through 43 are realleged and incorporated by reference herein.

45. The fair market value of the limestone to be mined and processed as defined in the Mining Lease is $7.00 per ton.

46. The total limestone reserves on the Lease total 28,895.817 tons with a total fair market value of $206,271,419.00.

47. The total recoverable limestone reserves in the 40-acre Small Mine Permit Application now pending is 3,036,910 tons. The fair market value of which is $21,958,370.00.

48. The total recoverable limestone reserves in the 110 acre parcel is 2,834.289 tons. The fair market value of which is $19,840,023.00.

49. The Plaintiff has mined to date 113,070 tons from these reserves under its 10-acre exemption.

50. By reason of the foregoing, Plaintiff's damages are claimed as follows:

a.	Temporary Takings Claim:	
	40-Acre Small Mine Permit	2,923,840
	Net Tonnage @ $7.00/ton	$20,466,880.00
b.	Permanent Takings Claim:	
	110-Acre Permit	2,834,289
	Net Tonnage @ $7.00/ton	$19,840,023.00
	Total Damages Claimed:	$40,036,903.00

WHEREFORE, Plaintiff demands judgment against the Defendant for the alleged takings claims and its damages as alleged herein, interest from April 2, 1992, attorney fees, and its costs of this action, all as just compensation for the taking of Plaintiff's property rights.

DATED this 23 day of February, 1994.

s/JOHN R. HURSH
Attorney for Plaintiff

APPENDIX F

WYOMING STATUTES § 35-11-406(m)

"[T]he requested permit, other than a surface coal mining permit, shall be granted if the applicant demonstrates that the application complies with the requirement of this act and all applicable federal and state laws. The director shall not deny a permit except for one (1) or more of the following reasons:

(i) The application is incomplete;

* * *

(vi) The proposed mining operation would irreparably harm, destroy or materially impair any area that has been designated by the council a rare or uncommon area and having particular historical, archaeological, wildlife, surface geological, botanical or scenic value;

* * *

(x) If written objections are filed by an interested person under subsection (f) [sic (k)] of this section."

WYOMING STATUTES § 35-11-112(a)(v)

The EQC shall ...

"(v) Designate at the earliest date and to the extent possible those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. When areas of privately owned lands are to be considered for such designation, the council shall give notice to the record owner and hold hearing thereon, within a county in which the

are, or major portion thereof, to be so designated is located, in accordance with the Wyoming Administrative Procedure Act."

Supreme Court, U.S.
FILED
DEC 9 1996
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(2)

No. 96-601

In The

Supreme Court of the United States

October Term, 1996

RISSLER & MCMURRY CO.,
a Wyoming corporation,

Petitioner,

v.

THE STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The Wyoming Supreme Court

BRIEF IN OPPOSITION

WILLIAM U. HILL
Attorney General
THOMAS JOHN DAVIDSON
Deputy Attorney General
Counsel of Record
WATER AND NATURAL
RESOURCES DIVISION
OFFICE OF THE WYOMING
ATTORNEY GENERAL
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6946

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Wyo. Stat. § 35-11-1001(b).

Wyoming Rules of Civil Procedure, Rule 12.

Wyoming Department of Environmental Quality Rules of Practice and Procedure, Chapter VII, Section 11(e)(ii).

STATEMENT OF JURISDICTION

Petitioner Rissler & McMurry Co. filed its Petition For Writ of Certiorari on October 11, 1996. Rissler & McMurry Co. cites *28 U.S.C. § 1257* and *Rule 10(e) of the Rules of the United States Supreme Court* as authority for the Court to review, through a writ of certiorari, the decision of the Wyoming Supreme Court, issued June 5, 1996, rehearing denied July 16, 1996. There is no *Rule 10(e) of the Rules of the United States Supreme Court*. Thus, it appears Rissler & McMurry Co. seeks review pursuant to *Rule 10(c)*, which provides that the Court may review this matter if it determines that the Wyoming Supreme Court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

Respondent State of Wyoming (Wyoming) is not satisfied with Rissler & McMurry Co.'s statement of the case. Wyoming offers in its place the statement of facts contained in the opinion of the Wyoming Supreme Court. *Rissler & McMurry Co. v. State of Wyoming*, 917 P.2d 1157, 1159-60 (Wyo. 1996); Petition, Appendix A, pp. 17-20.

In addition, Wyoming identifies Rissler & McMurry Co.'s misstatements of fact and law below, pursuant to *United States Supreme Court Rule 15.2*. Rissler & McMurry Co. implies these facts have a bearing on the issues properly before this Court. While Wyoming questions whether these allegations have any bearing, we address the misstatements to preserve the right to challenge the allegations.

Rissler & McMurry Co. mischaracterizes the Wyoming Supreme Court's decision by stating that it relied on facts not found in the record on appeal. Petition, p. 3. Rissler & McMurry Co. refers to its Petition For Rehearing before the Wyoming Supreme Court, where it sets forth in detail three matters the Court considered which are allegedly outside the record. Petition Appendix C, p. 45. Each of these matters is, in fact, supported by the record on appeal. The first is located in the Complaint, R. 3C, ¶ 15; Petition Appendix E, p. 63; the second is located at R. 236; and the third matter which Rissler & McMurry Co. alleges is not in the record is located in the Complaint, R. 4-5, ¶¶ 21 and 24; Petition, Appendix E, p. 64.

REASON TO DENY PETITION

THE WYOMING SUPREME COURT FOLLOWED *WILLIAMSON* IN HOLDING THAT RISSLER & McMURRY CO. MUST EXHAUST ADMINISTRATIVE REMEDIES

Rissler & McMurry Co. seeks review of the Wyoming Supreme Court's decision in *Rissler & McMurry Co. v. State of Wyoming*, alleging it conflicts with this Court's decisions. It is important that this Court understand from

the outset that this case is not one of misapplication of any decision of this Court. Rather, it is simply and purely a matter of Rissler & McMurry Co.'s own refusal to exhaust available remedies; nothing more. The Wyoming Supreme Court affirmed the First Judicial District Court's decision, both of which held that Rissler & McMurry Co.'s claim was not ripe because Rissler & McMurry Co. failed to exhaust administrative remedies to establish a taking and failed to follow procedures designed to compensate it for an alleged taking. 917 P.2d at 1160-1.

The Wyoming Supreme Court's opinion is indeed consistent with this Court's decisions. *Rissler & McMurry Co.*, 917 P.2d at 1161-2, citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194-95 (1985). This Court has already stated it would deny review if the petitioner failed to exhaust its remedies and the State's highest court made its decision based on that principle. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011-1012, 1029 (Kennedy concurrence) (1992); *Presbytery of Seattle v. King County*, 114 Wash.2d 320, 787 P.2d 907 (en banc), *cert. denied*, 498 U.S. 911 (1990).

It is undisputed that Rissler & McMurry Co., of its own volition, withdrew its application for a permit prior to the Wyoming Environmental Quality Council's final decision. Petition, p. 9. Rissler & McMurry Co. cannot know whether Wyoming would have "taken" its property until Wyoming is provided the opportunity to make a final decision. Rissler & McMurry Co.'s voluntary withdrawal of its application prior to final action by the Wyoming Environmental Quality Council deprived Wyoming of any opportunity to render such a final decision.

Thus, the Wyoming Supreme Court correctly held that Rissler & McMurry Co.'s takings claim was not ripe.

In the Wyoming Supreme Court, Rissler & McMurry Co. contended that it should not be required to exhaust its remedies, based upon the allegation that to do so would have been futile. However, nothing in the record supports its erroneous assertion. The Wyoming Supreme Court properly rejected that very argument because the facts, as alleged by Rissler & McMurry Co. in its complaint, do not meet the substantial burden necessary to overcome "the strong public policies favoring the exhaustion doctrine." *Rissler & McMurry Co.*, 917 P.2d at 1162, citing *Presbytery of Seattle, supra*, 787 P.2d at 916-17.[1]

RESPONSE TO RISSLER & McMURRY CO.'S REASONS

THE WYOMING SUPREME COURT'S DECISION TO AFFIRM THE TRIAL COURT'S ORDER GRANTING THE MOTION TO DISMISS IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Wyoming District Court properly dismissed Rissler & McMurry Co.'s complaint on the basis that Rissler & McMurry Co. failed to exhaust its administrative remedies. Petition, Appendix B, p. 35. Rissler & McMurry Co. argues its takings claim cannot be dismissed under

[1] Petitioner suggests the Wyoming Environmental Quality Council proceeded with a strategy designed to never reach a final decision. Yet, Petitioner admits the Council had scheduled a hearing in April of 1994, which was never held because Petitioner withdrew its permit application before the hearing. Petition, p. 8.

Wyoming Rules of Civil Procedure, Rule 12(b)(6), because takings claims are "uniquely fact specific". This issue appears to be presented for the first time in Rissler & McMurry Co.'s Petition For Rehearing. Petition, Appendix C. This Court could deny review on that basis alone. *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

Even if Rissler & McMurry Co. properly raised this issue for certiorari, it presents no cogent argument to support its position. In support of this argument, the Rissler & McMurry Co. cites *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), and *Lucas.* Wyoming is unable to find Rissler & McMurry Co.'s proposition stated in the cited cases, or any other case.

Rissler & McMurry Co.'s argument defies logic, given the foundation of the order dismissing this case. Pursuant to the *Wyoming Rules of Civil Procedure, Rule 12(b)(6),*[2] Wyoming essentially admitted, for purposes of the motion, the material factual allegations of the complaint, nonetheless contending that the Rissler & McMurry Co. was not entitled to relief under the facts alleged in support of the claim. *Hospital Building Co. v. Trustees of the Rex Hospital,* 425 U.S. 738 (1976); *Carbon County School District No. 2 v. Wyoming State Hospital,* 680 P.2d 773 (Wyo. 1984). Since the facts, as Rissler & McMurry Co. pleaded them, failed to state a claim, it was just as appropriate to dismiss Rissler & McMurry Co.'s takings claim as any other. Neither *Lucas,* nor any other

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[2] *Rule 12(b)(6) of the Wyoming Rules of Civil Procedure* is identical to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.*

opinion of this Court forbids application of Rule 12 to a complaint alleging an unconstitutional taking. In fact, this Court has denied certiorari under these very circumstances. See, e.g., *Presbytery of Seattle, cert. denied*, 498 U.S. 911 (1990).

RISSLER & McMURRY CO. PRESENTS AN ISSUE OF STATE LAW WHICH WAS NOT RAISED BEFORE OR DECIDED BY THE WYOMING SUPREME COURT

Rissler & McMurry Co. argues it has challenged a rule promulgated by the Wyoming Environmental Quality Council as invalid on its face.[3] Rissler & McMurry Co. argues that by doing so it is not obligated to exhaust administrative remedies, according to this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). The basis for Rissler & McMurry Co.'s challenge is its allegation that the Wyoming Environmental Quality Council's enabling legislation does not authorize it to promulgate the rule. Petition, p.11.

Statutory authority to promulgate rules is an issue of state law, which the Wyoming Supreme Court has not addressed because Rissler & McMurry Co. raised the issue for the first time on appeal. *Rissler & McMurry Co.*, 917 P.2d at 1162, fn.1. Thus, this Court should not decide this question. *28 U.S.C. 1257(a); Lear, Inc. v. Adkins*, 395 U.S. 653, 674-5 (1969); *Uphaus v. Wyman*, 360 U.S. 72, 75 (1959).

---

[3] Petitioner challenges *Wyoming Department of Environmental Quality Rules of Practice and Procedure, Chapter VII, Section 11(e)(ii)*. Respondent has attached as Appendix A pertinent provisions from this chapter, including the provision in question, which is highlighted for the Court's convenience. App. 3.

Further, Rissler & McMurry Co. did not allege in the trial court that the rule is invalid on its face. Its complaint only challenged the rule as applied to Rissler & McMurry Co.. Petition, Appendix E, pp. 62-64, ¶¶ 13, 15, 18, and 19. In *Yee*, this Court held that an allegation in a complaint of facial invalidity is not rendered unripe on the ground of complainants's failure to exhaust remedies. 503 U.S. at 533. Here, since Rissler & McMurry Co.'s complaint challenged the rule, only as applied to it, the claim cannot survive.

THE WYOMING SUPREME COURT'S DECISION REQUIRING RISSLER & McMURRY CO. TO FOLLOW WYOMING PROCEDURE IS CONSISTENT WITH THIS COURT'S DECISIONS.

The Wyoming Supreme Court required Rissler & McMurry Co. to follow Wyoming procedures to pursue its taking claim. *Rissler & McMurry Co.*, 917 P.2d at 1161-62. Rissler & McMurry Co. cites *Lucas* and *Yee* in support of the argument that Wyoming cannot procedurally limit Rissler & McMurry Co.'s ability to pursue a takings claim by requiring it to seek compensation through *Wyo. Stat. § 35-11-1001(b)*. Petition, p. 14.

Neither *Lucas* nor *Yee* stand for the proposition that a State cannot establish procedures through which Rissler & McMurry Co. would be compensated for an alleged taking. As the Wyoming Supreme Court pointed out, this Court has decided that States can establish such procedures and that a takings claim is not ripe until the complainant seeks compensation through those procedures. *Williamson County Regional Planning Commission,*

473 U.S. at 194-95; *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 297 (1981). Rissler & McMurry Co. has not done so.

CONCLUSION

Petitioner Rissler & McMurry Co. has failed to demonstrate any reason under *28 U.S.C. 1257 or Rule 10 of the Supreme Court Rules* for this Court to consider this case. There is no divergence between the Wyoming Supreme Court's decision and the decisions of this Court. Rather, the Wyoming Supreme Court has explicitly relied upon the law as established by this Court. The Court applied State law precisely as directed by this Court.

The bottom line is that Rissler & McMurry Co. withdrew its application before Respondent State of Wyoming could act, thereby refusing to exhaust its remedies. Under such circumstances, this Court should deny Rissler & McMurry Co.'s Writ of Certiorari.

Respectfully submitted,

WILLIAM U. HILL
Attorney General
THOMAS JOHN DAVIDSON
Deputy Attorney General
Counsel of Record
WATER AND NATURAL
RESOURCES DIVISION
OFFICE OF THE WYOMING
ATTORNEY GENERAL
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-6946

APPENDIX A

CHAPTER VII

DESIGNATION OF AREAS PURSUANT TO W.S. § 35-11-112(a)(v)

Section 11. Criteria for Designation.

(a) In considering designations, the Council shall follow a two-tiered review process. First, the Council must determine whether the area is eligible for designation by virtue of the existence of one or more of the particular values specified in the statute. Secondly, the Council must determine whether any particular value that is found to exist is very rare or uncommon.

(b) For an area to be eligible for designation, the Council must make an initial finding that the area at issue possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value. For purposes of making the initial finding, or refusing to make the initial finding, the Council shall consider the significance and the weight of all specifically identified factors that are set forth in these criteria.

(c) For purposes of determining whether an area of the State may be considered to have particular historical, prehistorical, or archaeological value the Council shall consider the following factors:

(i) Whether the area is mentioned prominently in historic journals or other historic literature;

(ii) Whether the area is important because it is associated with cultural or religious traditions and practices;

(iii) Whether the area has received designation pursuant to state or federal laws that provide for special protection and management due to outstanding historic or prehistoric values such as national historic landmarks, national historic sites, or the National Register of Historic Places; or

(iv) Whether the area contains buildings, structures, artifacts, or other features that are significant in the history or prehistory of the state.

(d) For purposes of determining whether an area has particular wildlife value the Council shall consider the following factors:

(i) Whether the area includes lands that are considered irreplaceable fish or wildlife habitat;

(ii) Whether the area includes preserves or easements which have been established and used for the protection for habitat for wildlife;

(iii) Whether the area includes lands that the Game and Fish Department has designated as crucial or vital habitat for resident species;

(iv) Whether the area contains or may affect fisheries classified as class I by the Wyoming Game and Fish Department;

(v) Whether the area includes fragile lands that offer unique wildlife or scientific values;

(vi) Whether the area includes federally designated critical habitat for threatened or endangered plant or animal species which is determined by the U.S. Fish and Wildlife Service or the Wyoming Game and Fish

Department to be of essential value and where the presence of threatened or endangered species has been scientifically documented;

(vii) Whether the area contains a bald or golden eagle nest or nest site that is determined to be active and includes all or a portion of a buffer zone of land around the nest which has been evaluated and approved by the U.S. Fish and Wildlife Service;

(viii) Whether the area includes bald and golden eagle roost and concentration areas used during migration and wintering;

(ix) Whether the area contains a falcon (excluding kestrel) cliff nesting site with an active nest and a buffer zone around the nest site which has been evaluated and approved by the U.S. Fish and Wildlife Service; or

(x) Whether the area includes lands which are high priority habitat for migratory birds of high federal interest on a regional or national basis as determined by the U.S. Fish and Wildlife Service.

(e) For purposes of determining whether an area has particular surface geological value the Council shall consider the following factors:

(i) Whether the area has unique surface geological formations that expose upheavals and faults that are indicative of sub-surface geological features;

(ii) Whether the area has significant paleontological resources; or

(iii) Whether the area has geologic features with unusual or substantial recreational, aesthetic, or scientific value.

(f) For purposes of determining whether an area has particular botanical value the Council shall consider the following factors:

(i) Whether the area is critical habitat for endangered or threatened plant species as designated by state or federal agencies;

(ii) Whether the area contains stands of a rare native vegetation type, or contains stands of a native vegetation type that is now rare, or contains stands of a native vegetation type in pristine condition for which pristine stands are unusual; or

(iii) Whether the area contains plant species and habitat determined to be crucial or vital for resident wildlife species.

(g) For purposes of determining whether an area has particular scenic value the Council shall consider the following factors:

(i) Whether the area incudes lands within or adjacent to a corridor for a river designated as a National Wild and Scenic River or a corridor for a National Scenic Byway;

(ii) Whether the area has been the subject of substantial artistic attention in the works of artists, sculptors, photographers, or writers; or

(iii) Whether the area has substantial aesthetic value and its value would be apparent to a reasonable person.

(h) An area shall be designated pursuant to W.S. § 35-11-112(a)(v) if, in addition to finding that the area is eligible for designation pursuant to Section 11.a., the Council finds that the area is very rare or uncommon. For purposes of determining if an area is very rare or uncommon the Council shall consider the following:

(i) Whether the area exhibits historical, archaeological, wildlife, surface geological, botanical, or scenic values that are very rare of [sic] uncommon when compared with other areas of the state or a region therein;

(ii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values seldom found within the state or a region therein; or

(iii) Whether the area contains historical, archaeological, wildlife, surface geological, botanical, or scenic values known or suspected to be declining which, if left unprotected, could become extinct or extirpated.

(3)

Supreme Court, U.S.
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No. 96-601

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PETITIONER'S REPLY BRIEF

JOHN R. HURSH
Attorney for Petitioner
Central Wyoming Law
Associates, P.C.
105 South 6th East Street
P.O. Box 1783
Riverton, Wyoming 82501
(307) 856-4157

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PETITIONER'S REPLY BRIEF

SUMMARY OF REPLY ARGUMENT

1. The Response Brief filed by the State of Wyoming asserts that the Petitioner's complaint challenges the State's Administrative Rule as invalid **as applied** to it and therefore falls outside the mandate of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 and *Yee v. City of*

Escondido, 503 U.S. 519 (1992) which renders a takings claim ripe upon enactment of a **facially** invalid rule. To the contrary, Petitioner's complaint alleges a **facially invalid** rule claim and a forum has been erroneously denied to decide the legal sufficiency of this claim in the state courts upon ripeness grounds under *Lucas* and *Yee*. Further, the assertion by the State of Wyoming that Petitioner failed to assert the facially invalid rule in the trial court under *Yee* and *Lucas* on appeal is erroneous. It was pled in the complaint and the courts of the State of Wyoming refused to address the issue or provide a forum to determine the merits of the claim.

2. The state court's reliance upon *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172; *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.,* 452 U.S. 264 (1981); and *Presbytery of Seattle v. King County,* 787 P.2d 907 (Wash. 1990) Cert. denied 498 U.S. 911, and rejecting *Lucas* and *Yee,* supra, at the Rule 12(b)(6) procedural posture is misplaced.

REPLY ARGUMENTS

I.

The response brief of the State of Wyoming takes the position that the allegations of Petitioner's complaint relating to the invalid rule making by its administrative agency should be read as an "as applied" challenge so as to avoid the ripeness mandate of *Lucas* and *Yee*. Such interpretation is erroneous. The complaint alleges the invalid Administrative Rule in the context of an enactment of a facially invalid rule in violation of the state agencies' statutory mandates and definitions. As such, the complaint alleges a prima facie facially invalid rule challenge under *Lucas* and *Yee* which

clearly vests standing and ripeness to a takings claim upon the date of enactment of the alleged facially invalid rule.[1]

At the Rule 12(b)(6) level, a constitutionally based complaint is not to be dismissed unless it appears beyond doubt that Petitioner can prove no set of facts to sustain the claim. *Haines v. Kerner*, 404 U.S. 519 (1972). Here, because of the Rule 12(b)(6) dismissal by the state courts of Wyoming, a forum has been denied to determine the factual and legal basis of this invalid rule claim. The invalidity of the rule has been pled under *Lucas* and *Yee* and that is all that is required to vest standing at this procedural point. Until a forum is provided and the fact specific merits of this claim are developed, the validity and legal sufficiency of this aspect of Petitioner's claim has not been determined. The injury in fact is alleged and *Lucas* and *Yee* require nothing more at the pleading stage under Rule 12.

The state courts refusal to consider the facially invalid rule issue cannot be placed at the feet of the Petitioner here. The Petitioner's claim was pled and briefed in the trial court and the Supreme Court. Both courts ducked the issue to avoid this Court's clear rulings in *Lucas* and *Yee* concerning ripeness in the context of alleged facially invalid rule takings claims. The Petitioner pled and briefed its cause and *Lucas* and *Yee* require nothing more at the pleading stage. Hence this Writ is filed to obtain a forum in the state courts of Wyoming to determine the merits of Petitioners constitutionally based takings claim.

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[1]The Wyoming Supreme Court has consistently condemned the type of invalid Administrative Rule making as seen in this case. *See Kerr-McGee Corporation v. Wyoming Oil & Gas Conservation Commission*, 903 P.2d 537 (Wyo. 1995). However, in the instant case, the state courts refused to address that issue knowing full well the ripeness ramifications of *Lucas* and *Yee* should they do so.

II.

The State of Wyoming's reliance upon *Williamson*, supra; *Hodel*, supra and *Presbytery of Seattle*, supra as controlling over *Lucas* and *Yee* is misplaced. This case is pled under *Lucas*, *Yee* and *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Those cases control the ripeness issues upon which this Writ to review the Rule 12(b)(6) dismissals by the state courts turn. After *Lucas*, the Washington courts have reconsidered *Presbytery of Seattle* and severely limited that decision. *Powers v. Skagit County*, 835 P.2d 230 (Wash. 1992).

This case was pled and is controlled by *Lucas* and *Yee* on the issues of ripeness, standing and exhaustion of administrative remedies at the pleading stage. Again a forum has been denied to determine the merits and legal efficacy of these issues of law and fact to which the principles of takings law as developed by this court can be applied, upon an uncompromised record, and after which appropriate appellate review can follow.

CONCLUSION

A vast majority of the lands in the State of Wyoming are owned by governmental entities. To deny a forum to hear a constitutionally based takings claim in the state courts based upon an absolute adherence to the Administrative Exhaustion Rule renders the precedents of *Lucas* and *Yee* meaningless in Wyoming.

This Writ should be granted and the cause summarily remanded to the state courts of Wyoming to provide a forum for the determination of the merits of these claims.

Respectfully submitted,

John R. Hursh
CENTRAL WYOMING LAW
ASSOCIATES, P.C.
P.O. Box 1783
Riverton, Wyoming 82501
(307) 856-4157

Attorney for the Petitioner

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